Supreme Court, U.S.
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In The
Supreme Court of the United States

GUADALUPE GUAJARDO, JR; CLASS ACTION FOR TEXAS INMATES #844,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in granting the State's motion to terminate the consent decree, the burden of proof was erroneously placed on the Guajardo Petitioners to show current and ongoing constitutional violations rather than requiring the State, as the party seeking relief, to demonstrate that there were no current, ongoing constitutional violations.

2. Whether the Guajardo Petitioners were entitled to an evidentiary hearing prior to termination of the consent decree given that the district court indicated that it intended to treat the termination proceedings like a summary judgment and where the Guajardo Petitioners established questions of fact regarding current and ongoing constitutional violations at Texas prisons.

PARTIES TO THE PROCEEDING

The parties to the proceedings are:

GUADALUPE GUAJARDO, JR; an individual, on behalf of himself and a class of persons similarly situated.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE-INSTITUTIONAL DIVISION

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

Guadalupe Guajardo, Jr.; Class Action for Texas Inmates #844 v. Texas Department of Criminal Justice, 363 F.3d 392 (5th Cir. March 16, 2004). App. 1-App. 10.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Fifth Circuit entered its judgment on March 16, 2004. The Guajardo Petitioners seek review of the judgment on a writ of certiorari.

The Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISIONS INVOLVED IN THE CASE

The Prison Litigation Reform Act (the "PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), codified as amended at 18 U.S.C. § 3626.

STATEMENT OF THE CASE

On May 25, 1971, inmate Guadalupe Guajardo, Jr. filed suit under 42 U.S.C. § 1983 against the Texas Department of Corrections (TDC), now the Texas Department of Criminal Justice-Institutional Division (TDCJ-ID), on behalf of himself and a class of other

inmates. Mr. Guajardo claimed that the prison's rules and practices governing inmate mail then in effect violated the Texas inmates' constitutional rights under the First Amendment. R20:1-2.

After many years of litigation, on July 14, 1983, the district court entered an opinion and a final judgment approving a settlement (R15:1498-1557), which revised the correspondence rules and practices. *See Guajardo v. Estelle*, 568 F. Supp. 1354 (S.D. Tex. 1983). The correspondence rules addressed, among other things, general, special, attorney, and media mail; indigent postage; the suspension of mail privileges; packages; mail records kept by prison officers; publications; the rejection of publications or mail; notary services; the forwarding of mail; the correspondence review process; confidentiality of mail; contraband in correspondence; administrative and punitive segregation; and the prison mailrooms. Under the terms of the final judgment, the district court retained jurisdiction to enforce the July 14, 1983 agreed settlement and related consent decree.

Following the 1983 agreed settlement, the judgment was modified on more than one occasion. For example, a Final Judgment and Order were entered on July 1, 1986, approving a settlement that ordered the State to amend the correspondence rules with respect to inmate-to-inmate mail. R13:1919-67.

However, even after the July 1, 1986 settlement, the State still failed to comply with provisions in the correspondence rules/final judgment, including the procedure for review of publications and relating to incoming packages and publications. As a result, the Guajardo Petitioners filed a motion for contempt on April 12, 1995 and an

amended motion for contempt on April 24, 1995. R13:2071-83. The State responded with a motion for relief from the judgment. At the district court's request, the State withdrew its pending motion for relief from judgment, and the parties reached a resolution on the rule relating to packages of stationery and publications. R13:2087-91; R13:2104-08.

Pursuant to the district court's request, the Guajardo Petitioners withdrew their pending motion for contempt so that the State could file a motion to modify the 72-Hour Rule.[1] R13:2109-12. The State filed its motion for modification on July 9, 1996. R13:2113-25. The Guajardo Petitioners opposed that motion and offered an alternative proposal for modification. R13:2126-45. Negotiations over a proposed modification to the 72-Hour Rule failed however. The parties and the court agreed to a scheduling order that was then entered by the court for discovery and briefing on modification of the 72-Hour Rule. R13:2151. The Guajardo Petitioners conducted discovery regarding the way the current system of publications review operates

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[1] The 72-Hour Rule provides:

> If a publication is rejected, the inmate, the editor and/or the publisher will be provided a written notice of the disapproval and a statement of the reason therefore within seventy-two (72) hours of receipt of said publication on Publication Denial Forms. Within the same time period, the inmate, the editor and/or the publisher shall be notified of the right to and the procedure for appeal. The inmate will be given a sufficiently detailed description of the rejected publication to permit effective utilization of the appeal procedures. Whereupon the inmate, the editor or the publisher may appeal the rejection of the publication through the Correspondence Review Procedure outlined in Rule 3.9.14.

in order to determine whether the State had met the legal standard required for modification of the rule. The discovery revealed that the State was (1) violating the consent decree; (2) devoting only a small portion of its time to review of publications (when they got around to it); and (3) operating under a system that not only had no time constraints but pursuant to which the State could not even determine how long it took them to review a publication. R12:2256-2332.

Without resolving the disputes over the 72-Hour Rule, the State sought to terminate the consent decree in 1997. On February 3, 1997, while the State's motion for modification was pending, the State filed a motion to abate the motion to modify and a "supplemental" motion to terminate the prospective relief provided by the consent decree pursuant to the recently enacted Prison Litigation Reform Act ("PLRA"). R13:2152-68. The State claimed that as a result of the motion to terminate, the motion for modification was moot. R13:2153. At a hearing held on August 19, 1997, the district court indicated once again its desire that the 72-Hour Rule be resolved prior to any consideration of the motion to terminate and ordered the parties to attempt again to negotiate a settlement on that issue. R12:2461.

The State objected to any further negotiations on modification of the correspondence rules and moved the court to rule promptly on its motion to terminate. R9-11:2462-3129. The Guajardo Petitioners urged the court to resolve the issue of modification of the 72-Hour Rule and impose some reasonable time constraints on the State's review of inmates' publications prior to considering whether the court's jurisdiction over the consent decree must be terminated under the provisions of the PLRA. The

Guajardo Petitioners also requested that if the termination issue was to be resolved, the court allow them to conduct discovery on whether there were ongoing constitutional violations. R8:3242-3373; R9:3131-45.

The limited discovery the Guajardo Petitioners were able to conduct revealed that TDCJ-ID practices continued to violate the constitutional rights of inmates. Counsel for the Guajardo Petitioners sent questionnaires to approximately 1,458 class members asking about current and ongoing constitutional violations related to the mail system at TDCJ-ID. R5:4058. Only 15% of the questionnaires sent to inmates during the discovery phase of this termination proceeding were timely returned, prompting a further inquiry as to why the response rate was so low.

In response to the second inquiry, more than 6% of inmate recipients responded that their questionnaires had never arrived or had been completed but were likely blocked on the way out of the prison unit. R1:5274. In any event, the evidence gathered through inmate questionnaires demonstrates that (or at least raises a fact issue as to whether) the State continued to violate the inmates' constitutionally protected rights by (1) interfering with protected classes of mail; (2) denying access to the courts; (3) retaliating against inmates for exercising their constitutional rights; (4) denying materials based on content without any reasonable relationship to legitimate penological interests; and (5) denying any meaningful opportunities to appeal censorship decisions. R5:4039-59 and exhibits A1-191, B1-33, C1-5, D, E1-3, F, G, H.

Despite the evidence put forth by the Guajardo Petitioners, the district court granted the State's motion to terminate. The district court issued a Final Judgment and

Memorandum and Order on September 24, 2002, thereby terminating the consent decree's prospective effect.[2] App. 11-App. 61. The Guajardo Petitioners then appealed this case to the Court of Appeals for the Fifth Circuit. In a per curiam opinion, the Fifth Circuit affirmed the district court's judgment. App. 1. It is from this judgment that the Guajardo Petitioners now petition for a writ of certiorari.

ARGUMENT

I. The Fifth Circuit Erroneously Placed the Burden of Proof on the Guajardo Petitioners to Show That Current and Ongoing Constitutional Violations Exist.

The PLRA "establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions." *Miller v. French*, 530 U.S. 327, 331 (2000). Under the PLRA, a court may grant new relief or refuse to terminate existing relief if it finds that current and ongoing constitutional violations exist and that prospective relief is narrowly tailored to remedy that violation. *See Ruiz v. United States*, 243 F.3d 941, 947 (5th Cir. 2001).

[2] Since the consent decree was terminated, the State has revised several of its rules to further restrict correspondence to and from inmates. *See* www.tdcj.state.tx.us/announcements/announcement-offender-correspondence.htm. The State's recent actions, which further cripple inmates' rights to send and receive mail, demonstrate the need for the consent decree to be reinstated; otherwise, courts can expect a flood of litigation by individual inmates.

The Guajardo Petitioners argued to the Fifth Circuit that termination of the consent decree was inappropriate under the PLRA, 18 U.S.C. § 3626(b)(3), because the State did not establish that TDCJ-ID does not continue to violate the constitutional rights of its inmates with respect to its correspondence practices. However, the Fifth Circuit concluded that "a plain reading of the PLRA, including its structure, imposes the burden on the prisoners." App. 5. For the reasons discussed below, the Fifth Circuit erred in holding that the burden of proof to show the existence of constitutional violations rested with the Guajardo Petitioners.

A. There is a Split in the Circuits as to Which Party Bears the Burden of Proof on a Termination Motion.

This Court has not decided which party has the burden of proof to show that current and ongoing constitutional violations exist for purposes of determining whether a consent decree should be terminated. Indeed, there appears to be a split between the circuits on the burden of proof on a termination motion. *See Ruiz v. Johnson*, 154 F. Supp. 2d 975, 984 n.12 (S.D. Tex. 2001).

The First Circuit held, in *Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 20 (1st Cir. 2001), that in the context of a motion to terminate a consent decree, "the burden remains on the plaintiffs to show that such [current and ongoing constitutional] violations persist. . . . " On the other hand, the Ninth Circuit held, in *Gilmore v. People of the State of California*, 220 F.3d 987, 1008 (9th Cir. 2000), that the district court erred in allocating the burden of proof to the plaintiffs where a motion to terminate a consent decree is involved. *But see Hallett v.*

Morgan, 296 F.3d 732, 745-46 (9th Cir. 2002) (placing the burden of proof on the plaintiffs to show constitutional violations).[3]

In *Gilmore*, the court stated that "the [district] court placed the burden on plaintiffs to establish a current and ongoing violation of a Federal right rather than requiring the CDC, which had moved to terminate the decree, to prove its compliance with inmates' right of access to the courts." *Id.* Based on this error and others, the Ninth Circuit reversed the termination of prospective relief and remanded for further proceedings. *See id.* at 1010.

In this case, the Fifth Circuit followed the First Circuit, rather than the Ninth Circuit in *Gilmore*. This Court should grant the petition for writ of certiorari to resolve the split in the circuits on the issue of which party bears the burden of proof in the context of a motion to terminate a consent decree under the PLRA. *See Celotex Corp. v. Edwards,* 514 U.S. 300, 306 (1995) (this Court granted certiorari because of the conflict between two circuits); *see also* Rule 10 of the Rules of the Supreme Court of the United States.

B. It is Reversible Error for a Court to Place the Burden of Proof on the Wrong Party.

The burden of proof affects all aspects of a case. Courts have consistently held that placing the burden of proof on the wrong party in a civil action generally

[3] The Ninth Circuit is bound by its earlier decision unless the case is heard en banc and the earlier decision is overruled. *See Roundy v. Comm'r*, 122 F.3d 835, 837 (9th Cir. 1997).

constitutes reversible error. *See, e.g., Boles Trucking, Inc. v. United States*, 77 F.3d 236, 241 (8th Cir. 1996); *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986); *Mitchell v. United States*, 396 F.2d 650, 651 (6th Cir. 1968); *Voigt v. Chicago & N.W. Ry. Co.*, 380 F.2d 1000, 1004 (8th Cir. 1967); *Hersch Bldgs., Inc. v. Steinbrecher*, 253 N.W.2d 310, 312-13 (Neb. 1977); *Schumann v. McGinn*, 240 N.W.2d 525, 531 (Minn. 1976); *Deckard v. Adams*, 203 N.E.2d 303, 305-06 (Ind. 1965). The rationale for this holding is that it is impossible to determine whether the erroneous burden of proof was outcome determinative. *See, e.g., Schumann*, 240 N.W.2d at 531.

C. The Burden of Proof on a Termination Motion Should Rest with the Moving Party.

This Court should grant the petition for writ of certiorari in this case to resolve the circuit split and adopt the Ninth Circuit's approach in *Gilmore*, which holds that the burden of proof on a termination motion should rest with the party seeking to terminate – *i.e.*, the State. When the State moves to terminate a consent decree that was put in place to remedy proven constitutional violations, the only proper allocation of the burden of proof is one that requires the State to prove that it no longer violates the constitutional rights guaranteed to its inmates. This is especially true in the context of this case, given the district court's indication that it would treat the State's termination motion as a motion for summary judgment. In a summary judgment situation, the burden of proof is on the moving party and all inferences and ambiguities are resolved in favor of the nonmoving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88

(1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Indeed, the only way the Guajardo Petitioners could be required, at the summary judgment stage, to come forward with evidence that raises a fact issue is if they had the burden of proof. *See Celotex*, 477 U.S. at 323. Otherwise, the State was required to conclusively prove as a matter of law that there were no longer constitutional violations, a matter that the State wholly failed to prove – much less prove as a matter of law.

D. Policy Reasons Support Placing the Burden of Proof on the State.

The Fifth Circuit concluded that a plain reading of the PLRA, including its structure, imposes the burden on the prisoners. However, it is particularly important that the burden of proof for termination rest with the State in this type of situation given the comparatively weak position from which the nonmoving party, the Guajardo Petitioners and their counsel, were able to investigate constitutional violations related to the correspondence practices at Texas prisons. Counsel for the Guajardo Petitioners attempted to investigate the current and ongoing constitutional violations at Texas prisons from outside the system, generally communicating with the inmates inside the prison system through the very tool whose accessibility was in question.

Obtaining information showing ongoing constitutional violations was challenging. Indeed, the evidence shows that a significant percentage of the mail from the Guajardo Petitioners' attorneys, such as the correspondence discovery questionnaire sent to the inmates from the

Guajardo Petitioners' counsel, did not reach the inmates or was not returned to the Guajardo Petitioners' counsel. The Guajardo Petitioners' evidence shows that 6% of inmates indicated that they never received the discovery questionnaire or that it was never returned to the Guajardo Petitioners' counsel. R1:5274. This evidence reasonably raises an inference that the questionnaires were interfered with, and the party with the ability and opportunity to cause such an interference was the State. Thus, the evidence in the record indicates that the State interfered with attorney mail, and specifically, the discovery questionnaires regarding correspondence practices at Texas prisons.

Given the difficulties faced by the Guajardo Petitioners and their counsel in obtaining information in this case regarding the prison correspondence system, it was improper to place the burden of proof to show current and ongoing constitutional violations upon the Guajardo Petitioners. However, even with the burden of proof erroneously placed on the Guajardo Petitioners, their evidence does not merely indicate isolated incidents. At the very least, if this Court disagrees with the Guajardo Petitioners on the burden of proof issue, then in light of the challenges faced by the Guajardo Petitioners and their counsel, an evidentiary hearing should have been held for the inmates and state employees who actually dealt with these correspondence issues to present testimony.

II. The Guajardo Petitioners Were Entitled to an Evidentiary Hearing Prior to Termination of the Consent Decree.

Even if the Guajardo Petitioners were wrong about who had the burden of proof, the consent decree should not have been terminated. At the very least, given the summary

judgment-like procedure put in place by the district court for these proceedings, the Guajardo Petitioners raised fact issues sufficient to entitle them to proceed to the next stage of the proceedings. Thus, the Guajardo Petitioners were entitled to a live evidentiary hearing regarding the current and ongoing constitutional violations at Texas prisons where live witnesses could be examined and current evidence could be considered.

A. The Guajardo Petitioners Relied Upon the District Court's Indication That It Intended to Treat the Termination Proceedings Like a Summary Judgment.

The district court indicated several times at hearings and in written materials that it would treat the State's motion to terminate as one for summary judgment. R9:3234; R34:6; Supp. 16, 18. Contrary to the Fifth Circuit's opinion, these statements were not "isolated statements" "made in the context of managing discovery." App. 7. For example, at an oral hearing held on April 18, 1998, the district court stated:

> Court: All right, I'm going to look at the briefing with respect to the need for additional discovery, and I'll enter an order as to whether discovery should be permitted and the time table which should govern.
>
> Part of the task of doing that would be to be sure that we have the same understanding as to precisely what issues are going to either be resolved by, what – I mean, let me restate that.

> Precisely what issues, if any, would require further examination if the decree were not terminated under the PLRA.
>
> You have listed what you see as those issues on page 2 of what you have just filed. ***How do they relate to the issues that were the basis for the summary judgment motion, the motion to terminate***?
>
> * * *
>
> Court: Within the next two weeks provide me with a more refined statement of exactly what issues you believe to require additional discovery, and I would take that as a supplement to what is essentially ***a Rule 56-F motion***, that is a request for additional discovery prior to the Court rendering a decision on the ***summary judgment motion that's pending***.

Supp. 16, 18 (emphasis added). In the hearing minutes from that oral hearing, the district court also stated:

> The petitioner is to file within the next two weeks a more defined brief setting out the discovery still needed in this case. The court will consider this a motion for additional discovery under ***F.R.C.P. 56(f)***.

R9:3234. Additionally, the following exchange took place at an oral hearing on September 6, 2002, shortly before the district court rendered its opinion:

> Court: All right. Now I need some way to approach this in a manageable fashion.

> There was an indication in your pleadings, Ms. Jewell, that it was your assumption that the Court was going to treat it as a motion for summary judgment. Is that correct?
>
> Counsel: That is correct, You Honor.

R34:6.

The district court's statements described above, far from showing that the district court did not intend to apply a summary judgment-like standard, are consistent with the Guajardo Petitioners' understanding that the district court intended to apply summary judgment-like standards to the State's motion. Certainly, the Guajardo Petitioners' assumption was not corrected by the district court, and at no time were the Guajardo Petitioners informed that the motion to terminate was to be treated like anything other than a summary judgment.

The district court did indeed apply summary judgment-like standards to this case, as it had indicated that it would do for some time. For example, in its opinion, the district court purported to assume that all of the facts alleged were true, thereby demonstrating that it was applying a summary judgment standard. It stated that, "[e]ven if plaintiffs' complaint is true and defendants' review of publications is untimely under the 72-hour rule, a State's failure to follow its own rules or regulations, standing alone, does not establish a constitutional violation," (App. 21) and "[e]ven if each of the thirty-eight instances plaintiffs identified was true, however, the small number of claims and idiosyncratic nature of the acts and omissions described do not demonstrate current and

ongoing constitutional violations [on] a system-wide basis." (App. 35).

The district court, however, misapplied the summary judgment-like standard in this case when, among other reasons, it believed every proffered reason offered by the State for the denials of correspondence and publications, finding that the State's reasons were legitimate and compelling. This analysis was improper, given that under the summary judgment procedure, it should have resolved all disputed questions of fact in favor of the Guajardo Petitioners, the non-moving party. *See Celotex*, 477 U.S. at 322-23; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587-88.

B. The Guajardo Petitioners Established Questions of Fact Regarding Current and Ongoing Constitutional Violations at Texas Prisons and Were Entitled to Proceed to the Next Stage of the Case.

If summary judgment-like procedures were not followed by the district court, then the Guajardo Petitioners were entitled to an evidentiary hearing.[4] As discussed below, this Court should follow other courts of appeals that

[4] The Guajardo Petitioners acknowledged that an evidentiary hearing was not necessary in this case only in the context of the district court's statements that it would treat the State's motion to terminate the consent decree as a motion for summary judgment. Of course, in a summary judgment proceeding, no evidentiary hearing is required or permitted because all factual disputes are resolved in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (stating that if the evidence is such that a reasonable fact-finder could find in favor of the non-moving party, summary judgment should not be granted).

have concluded that an evidentiary hearing is required prior to termination of a consent decree.

The Guajardo Petitioners raised genuine issues of material fact regarding the following current and ongoing constitutional violations: (1) retaliation against inmates for their use of the mail system, including the prison's review and appeal process; (2) improper handling, processing, and denials of special/attorney correspondence; (3) unreasonable delays in processing publications; (4) improper denials of general correspondence and publications based on content, in what amounts to censorship; (5) delays with special/privileged mail and improper restrictions on the inmates' access to supplies that result in a denial of access to the courts; and (6) improper denials of media mail.

While the State argued that at worst its actions in opening and mishandling special/attorney and media correspondence amount to negligence, that is exactly the sort of fact issue that needs to be tested at an evidentiary hearing. Fact questions surrounding the State's retaliation against inmates for their use of the correspondence system and the State's censorship of certain correspondence and publications should also be addressed through witnesses at an evidentiary hearing. Because the Guajardo Petitioners alleged facts which if true would amount to current and ongoing violations of federal rights, it was error to deny the inmates an evidentiary hearing prior to termination of the consent decree in this case.

For example, in *Loyd v. Alabama Department of Corrections*, 176 F.3d 1336, 1338 (11th Cir. 1999), the district court granted the attorney general's motion to terminate a consent decree governing the conditions of

confinement at the Jackson County Jail in Scottsboro, Alabama. In *Loyd*, a court-appointed monitor filed reports (up until two months prior to the motion to terminate), that did not indicate the existence of any current and ongoing federal law violations. *See id.* at 1342. Despite the existence of the monitor's reports, the court held that an evidentiary hearing was required prior to termination, stating that "[t]he party opposing termination must be given the opportunity to challenge or supplement the findings of the monitor and to present evidence concerning the scope of the challenged relief and whether there are current and ongoing violations of federal rights in the prison." *Id.* Thus, the Eleventh Circuit found that the district court's refusal to hold an evidentiary hearing constituted an abuse of discretion, even where current reports were provided to the court. *See id.*

Additionally, in *Cason v. Seckinger*, 231 F.3d 777, 778 (11th Cir. 2000), the district court granted the defendants' motion to terminate all of the remaining consent decrees governing prison conditions at the Middle Georgia Correctional Complex. On appeal, one of the things that the plaintiffs complained about was that their request for an evidentiary hearing was denied by the district court. *See id.* at 781. Pursuant to *Loyd*, the court held that it was an abuse of discretion for the district court to refuse to grant the plaintiffs the evidentiary hearing that they requested prior to termination of the consent decrees. *See id.* at 783. The court thus found that the district court's termination of the consent decrees was premature at best and vacated the portion of the district court's order terminating the decrees and remanded the case with instructions that an evidentiary hearing be conducted on the § 3626(b)(3) issues. *See id.*

Finally, in *Hadix v. Johnson*, 228 F.3d 662, 665 (6th Cir. 2000), the Michigan Department of Corrections filed a motion to terminate the consent decree entered in that case pursuant to the PLRA. The plaintiffs in *Hadix* complained that the district court's order terminated portions of the consent decree without the court having first conducted an evidentiary hearing on the existence of constitutional violations. *See id.* at 671. The Sixth Circuit stated that "[b]ecause the PLRA directs a district court to look to *current conditions*, and because the existing record at the time the motion for termination is filed will often be inadequate for purposes of this determination, the party opposing termination must be given the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations." *Id.* The court found that the plaintiffs in *Hadix* were not given an opportunity to present evidence of current and ongoing violations at an evidentiary hearing and remanded the case to give the plaintiffs an opportunity to do so. *See id.* at 672.

Additional evidentiary findings were necessary prior to termination of the consent decree in this case. *See Cagle v. Hutto*, 177 F.3d 253, 258 (4th Cir. 1999); *Loyd*, 176 F.3d at 1342; *Cason*, 231 F.3d at 783; *Hadix*, 228 F.3d at 671-72; *see also Benjamin v. Jacobson*, 172 F.3d 144, 166 (2nd Cir. 1999) (holding that "when the plaintiffs so request . . . the district court must allow the plaintiffs an opportunity to show current and ongoing violations of their federal rights."). As such, this Court should grant a writ of certiorari to consider whether this case should be reversed on the burden of proof issue or whether it should be remanded so that a live evidentiary hearing can be held where full discovery is permitted and live witnesses,

evidence, and arguments can be presented on the merits of the State's termination motion.

CONCLUSION

For these reasons, the Guajardo Petitioners respectfully pray that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

Gwen J. Samora
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APPENDIX

App. 1–App. 10	*Guajardo v. Texas Dept. of Criminal Justice*, 363 F.3d 392 (5th Cir. 2004) (No. 03-20170).
App. 11–App. 61	Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division, in *Guadalupe Guajardo, Jr., et al. v. Janie Cockrell, et al.*, Civil Action No. H-71-570, dated September 24, 2002.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-20170

GUADALUPE GUAJARDO, JR.; CLASS ACTION FOR TEXAS INMATES #844,

Plaintiffs-Appellants,

versus

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

(Filed March 16, 2004)

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

At issue is the district court's terminating the prospective relief provided by a 20-year-old consent decree concerning Texas prison correspondence rules, pursuant to motion by the Texas Department of Criminal Justice (TDCJ) under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626(b)(2)) (PLRA). Essentially for the reasons stated by the district court, *see* ***Guajardo v. Texas Department of Criminal Justice, et al.***, No. H-71-570 (S.D. Tex. filed 24 Sept. 2002) (***Guajardo***), the judgment is **AFFIRMED.**

I.

This litigation began approximately 33 years ago, resulting in this class action challenging the constitutionality of Texas prison correspondence rules and practices (the rules). An agreed settlement, approved in 1983, revised the rules (the consent decree). ***Guajardo v. Estelle***, 568 F. Supp. 1354 (S.D.Tex. 1983). The consent decree has been modified by stipulation on several occasions. In September 2002, following discovery, and through an extremely detailed 54-page opinion and order, the district court granted TDCJ's motion, filed in 1997, to terminate the prospective relief provided by the consent decree.

II.

Institutional consent decrees are "not intended to operate in perpetuity". ***Bd. of Educ. v. Dowell***, 498 U.S. 237, 248 (1991). The PLRA strongly disfavors continuing relief through the federal courts; indeed, its "fundamental purpose" was to extricate them from managing state prisons. ***Cagle v. Hutto***, 177 F.3d 253, 257 (4th Cir. 1999), *cert denied*, 530 U.S. 1264 (2000). The PLRA provides three methods for terminating such consent decrees: (1) the passage of time, 18 U.S.C. § 3626(b)(1)(A); (2) agreement by the parties, 18 U.S.C. § 3626(b)(1)(B); or (3) "if the relief was approved or granted in the absence of a finding by the court that [it was] narrowly drawn, extend[ed] no further than necessary to correct the violation of the Federal right, and [was] the least intrusive means necessary to correct the violation", 18 U.S.C. § 3626(b)(2), *unless* "the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation" of a federal right (ongoing

violation), and that, consistent with subpart (b)(2) above, the relief is narrowly drawn, extends no further than necessary, and is the least intrusive means, 18 U.S.C. § 3626(b)(3).

The district court held a hearing (not evidentiary) on TDCJ's motion to terminate relief, after discovery and numerous evidentiary submissions. The court found that the consent decree provided for greater prospective relief than required by federal law, and that TDCJ was entitled to termination, unless plaintiffs established that the relief remained necessary to correct an ongoing violation. ***Guajardo*** at 6-7. *Taking plaintiffs' allegations as true*, the court found: there was no system-wide constitutional violation showing that the prospective relief was necessary; and relief under the existing consent decree was neither narrowly drawn nor the least intrusive means to correct any individual violations. ***Id.*** at 49. The court noted an action pursuant to 42 U.S.C. § 1983 remains for prisoners with individual First Amendment claims. ***Id.*** at 50.

Plaintiffs contend the district court erred by: (1) placing the burden of proof on them to show ongoing violations rather than requiring TDCJ, the party seeking relief, to demonstrate none; (2) failing to treat TDCJ's motion as one for summary judgment; and (3) taking an "all-or-nothing approach" for terminating the decree, rather than maintaining it for particular prison units or rules.

A.

A district court's allocation of the burden of proof is reviewed *de novo*; its findings of fact on whether that

burden has been met, only for clear error. ***E.g.*, *Stevens Shipping & Terminal Co. v. Japan Rainbow II MV***, 334 F.3d 439, 443 (5th Cir. 2003). In placing the burden on plaintiffs, the district court cited the First Circuit's decision in ***Laaman v. Warden, N.H. State Prison***, 238 F.3d 14, 20 (1st Cir. 2001) (holding, to prevent termination, burden on prisoners under 18 U.S.C. § 3626(b)(3) to show ongoing violations). Noting a possible split between the First and Ninth Circuits on this point, and relying on ***Gilmore v. People of the State of California***, 220 F.3d 987 (9th Cir. 2000), plaintiffs contend the burden is instead upon the party challenging the consent decree – here, TDCJ.

Gilmore held the district court erred by terminating a consent decree pursuant to the PLRA, including by placing the burden of proof on the prisoners to establish ongoing violations instead of requiring movant to prove its compliance with the prisoners' right of access to the courts. Plaintiffs recognize, however, that only two years after ***Gilmore***, the Ninth Circuit in another PLRA action placed the burden on prisoners (movants) seeking a time extension for a consent decree. ***Hallett v. Morgan***, 296 F.3d 732, 741-45 (9th Cir. 2002). The court reasoned that the consent decree's impending expiration could be prevented only if movants proved ongoing violations. "The . . . standard for termination does not differ materially from the standard to be applied in deciding whether prospective relief is proper." ***Id.*** at 743. This reasoning – placing the burden of proof under 18 U.S.C. § 3626(b)(3) on the party opposing termination of a consent decree – is in obvious tension with the earlier reasoning in ***Gilmore***.

Here, the consent decree was approved before enactment of the PLRA, without the now required findings that

relief be narrowly drawn, extend no further than necessary to correct the violation of a federal right, and be the least intrusive means to correct the violation of that right. 18 U.S.C. § 3626(b)(2); *see also* ***Castillo v. Cameron County***, 238 F.3d 339, 351-52 (5th Cir. 2001). Therefore, the prospective relief terminates unless the district court makes these findings *and*, as discussed, also finds ongoing, system-wide violations.

TDCJ, in seeking termination, must initially establish the requisite passage of time. 18 U.S.C. § 3626(b)(1)(iii) (relief terminable upon motion of any party, but "in the case of an order issued . . . before the date of enactment of the [PLRA], 2 years after such date of enactment"). As held by most courts, the burden of proof then shifts to the prisoners to demonstrate ongoing violations and that the relief is narrowly drawn. 18 U.S.C. § 3626(b)(3). *See* ***Laaman***, 238 F.3d at 20; ***Ruiz v. Johnson***, 154 F. Supp.2d 975, 984 n.12 (S.D.Tex. 2001) (observing that constitutional violations were found where prisoners met their burden of proof); ***Imprisoned Citizens Union v. Shapp***, 11 F. Supp.2d 586, 604 (E.D.Pa. 1998), *aff'd sub nom.* ***Imprisoned Citizens Union v. Ridge***, 169 F.3d 178 (3d Cir. 1999) (holding PLRA not unconstitutional for placing on prisoners burden for proving ongoing violations).

We agree with the great majority of courts to address this issue: a plain reading of the PLRA, including its structure, imposes the burden on the prisoners. Section 3626(b)(3) places a limitation on the termination of prospective relief under a consent decree if the court makes the requisite written findings based on the record; but the burden of proof to support these findings is obviously on

the party opposing termination. Accordingly, that burden was allocated correctly to plaintiffs.

B.

In maintaining that the district court erred by not treating TDCJ's motion to terminate as one for summary judgment, plaintiffs cite two instances in which the court characterized the motion as one for summary judgment: at a hearing in April 1998; and during a telephonic status conference in early September 2002. This latter instance was only 18 days before the district court ruled.

At the April 1998 hearing, the court instructed plaintiffs to provide

> a more refined statement of exactly what issues you believe to require additional discovery, and I would take that as a supplement to what is *essentially* a Rule 56-F motion, that is a request for additional discovery prior to the Court rendering a decision on the summary judgment motion that's pending.

(Emphasis added.) This instruction concerning additional discovery was restated in the hearing minutes. At that hearing, the court also made the following statement to plaintiffs:

> Precisely what issues, if any, would require further examination if the decree were not terminated under the PLRA.
>
> You have listed what you see as those issues. . . . How do they relate to the issues that were the basis of the summary judgment motion, the motion to terminate?

The other instance cited by plaintiffs is the following colloquy from September 2002:

> **THE COURT:** All right. Now I need some way to approach this in a manageable fashion. There was an indication in your [plaintiffs'] pleadings . . . that it was *your assumption* that the Court was going to treat it as a motion for summary judgment. Is that correct?
>
> **[Plaintiffs' counsel]:** That is correct, Your Honor.

(Emphasis added.) The court, however, did not make any pronouncement, then or at any point during the litigation, that the motion would be treated as one for summary judgment. Indeed, the words "summary judgment" are noticeably absent from the court's 54-page opinion terminating the decree, rendered 18 days after the September 2002 colloquy. *See* ***Guajardo***.

Moreover, the only references by the court to summary judgment *procedure* were made in the context of managing discovery for the purpose of identifying issues relevant to terminating the consent decree. The court permitted plaintiffs to conduct additional discovery, akin to that permitted under Rule 56(f); there is, however, no basis for concluding that the court considered the motion as one for summary judgment. The court was aware of, but obviously did not agree with, plaintiffs' position that the motion should be treated in that fashion. These isolated statements in five years of litigation on the motion fall far short of reflecting that the district court considered the motion as one for summary judgment.

Consistent with their contention, plaintiffs maintain the court was obliged to view the evidence in the light

most favorable to them as nonmovants. Evaluating the evidence according to this claimed summary judgment standard, plaintiffs assert they created material fact issues on ongoing constitutional violations, which entitles them to the benefit of further proceedings. *See* FED R. CIV. P. 56.

Plaintiffs provide no basis for a motion to terminate a consent decree being treated as one for summary judgment. Indeed, summary judgment procedure is in tension with the framework of the PLRA, which requires the court to make written, outcome determinative findings based on the record, not intermediate written findings on whether issues of fact compel further proceedings.

In any event, the district court carefully considered each of the violations claimed by individual plaintiffs. ***Guajardo*** at 8-48 (plaintiffs claimed, with numerous individual allegations: (1) unnecessary delays in processing publications, in violation of the 72-Hour Rule; (2) delayed mail, resulting in a denial of access to courts; (3) improper processing and opening of special or privileged correspondence; (4) restrictions on media mail; (5) content-based denials of correspondence and publications; (6) lack of meaningful opportunity to appeal censorship decisions; and (7) retaliation). As the district court noted, the Supreme Court has required system-wide injury for system-wide injunctive relief. ***Id.*** at 48; *see* ***Lewis v. Casey***, 518 U.S. 343 (1996). The district court found that none of the allegations, *if true*, constituted an ongoing, system-wide violation. ***Guajardo*** at 49. Concomitantly, it noted that prisoners claiming violations may pursue individual relief pursuant to § 1983. As the district court ruled, the prospective relief granted under the consent decree was

neither narrowly drawn, extending no further than necessary to correct a constitutional violation, nor the least intrusive means necessary to correct a constitutional violation. ***Id*** at 49-50.

In so ruling, the district court noted that both sides indicated at the 6 September 2002 status conference that no evidentiary hearing was required. ***Id***. at 7 n.7. Plaintiffs state they did not then seek an evidentiary hearing because they understood that the motion would be treated as one for summary judgment. Under that standard, plaintiffs note that, as nonmovants, the record would be viewed in their favor, including all inferences to be drawn from it. Because the motion was not treated in that fashion, they claim they are entitled to an evidentiary hearing. Even assuming this point was not waived in district court, plaintiffs collide, again, with the PLRA's structure.

Whether to hold a PLRA pre-termination evidentiary hearing is within the discretion of the district court; generally, to receive such a hearing, plaintiffs' submissions must allege specific facts which, if true, would amount to an ongoing violation. *See* ***Guajardo*** at 7 n.7; ***Cagle***, 177 F.3d at 258. The district court concluded, however, that none of plaintiffs' allegations satisfied that requirement. ***Guajardo*** at 7 n.7. It did not abuse its discretion by not holding an evidentiary hearing.

C.

Plaintiffs also contend the district court abused its discretion by terminating the consent decree rather than at least maintaining it (1) at certain TDCJ units where numerous ongoing violations allegedly persist; and (2) for certain rules concerning those alleged violations. Plaintiffs

fail to identify either those TDCJ units or precisely the alleged violations. A PLRA termination decision is reviewed *de novo*. *See* ***Castillo***, 238 F.3d at 347.

Plaintiffs' contention is contrary to the scope of the district court's findings. It evaluated the numerous individual claims for each of the claimed violations and found in each instance there was no ongoing, system-wide violation. Plaintiffs identified a number of alleged violations for the court, but these allegations were expressly rejected.

Along this line, plaintiffs fail to identify any ongoing violations the district court failed to consider. Instead, they seek to re-litigate two aspects of the terminated decree: what constitutes a "package" (claiming failure of rules to provide a standard for "what constitutes a package" had the effect of denying plaintiffs access to the courts) and the "72-Hour Rule" (claiming violation of 72-Hour Rule caused unnecessary delays in processing publications; the rule requires written notice for inmate and editor or publisher within 72 hours of the rejection of any publication, including reasons for rejection and right to appeal). As the district court found, however, plaintiffs failed to demonstrate a system-wide constitutional violation concerning either that would require continuation of the consent decree. ***Guajardo*** at 12 and 26. Plaintiffs have failed to demonstrate that the court overlooked ongoing violations or was incorrect in determining past violations no longer persisted.

III.

For the foregoing reasons, the judgment is ***AFFIRMED.***

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUADALUPE GUAJARDO, JR., *et al.*, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-71-570
JANIE COCKRELL, *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

(Filed Sep. 24, 2002)

Defendants have filed a motion to terminate the consent decree in this prisoner class action lawsuit. Plaintiffs oppose that motion. After considering all of the relevant pleadings, voluminous exhibits, and the applicable law, this court grants defendants' motion and terminates the decree's prospective effect. This court also addresses other pending motions in this case, including plaintiffs' request for attorneys' fees.

I. Procedural History

This litigation began in 1971, when a state inmate incarcerated in the Texas Department of Corrections ("TDC"), now known as the Texas Department of Criminal Justice – Institutional Division ("TDCJ-ID"),[1] filed suit

[1] TDC became TDCJ-ID when the state legislature restructured the Texas criminal justice system in 1989. *See* Comprehensive Justice Reform Act, 71st Leg., R.S., ch. 785, 1989 TEX. GEN. LAWS 3471

(Continued on following page)

under 42 U.S.C. § 1983. In this case, which was consolidated with several others to form a class action, Guadalupe Guajardo Jr. and other similarly situated inmates challenged the constitutionality of the prison correspondence rules and practices then in effect. Following a trial in 1972, the district court found a number of those rules invalid and granted injunctive relief.[2] *See Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972). The Fifth Circuit reversed and remanded, holding that rules and regulations of statewide application such as those promulgated by the Texas prison system could only be enjoined by a three-judge panel. *See Sands v. Wainwright*, 491 F.2d 417 (5th Cir. 1973), *cert. denied sub nom. Guajardo v. Estelle*, 416 U.S. 992 (1974).

In 1975, plaintiffs amended their complaint and withdrew their request for injunctive relief. TDC promulgated new correspondence rules that were conditionally approved by the district court. After settlement negotiations failed to resolve plaintiffs' objections to the new rules, the district court severed certain disputed issues for trial. Following that trial in December 1976, the district court entered a declaratory judgment in plaintiffs' favor and final judgment approving a set of correspondence rules. *See Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977). The United States Court of Appeals for the Fifth Circuit affirmed most of the rules approved by the

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(generally effective Sept. 1, 1989). The class members in this case include only those inmates incarcerated in TDCJ's Institutional Division. For consistency, this order refers to defendant as TDCJ-ID except where it is appropriately referred to as TDC.

[2] The Honorable John Singleton originally presided over this case.

district court and modified others. *See Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978).

Disputes over the correspondence rules continued. In 1979, plaintiffs moved to enjoin TDC from violating the amended correspondence rules. The parties selected an independent consultant to monitor TDC's compliance with the amended rules. On February 23, 1983, the parties reached an agreed settlement. On July 14, 1983, the district court entered a *Memorandum and Order* and *Final Judgment* approving the agreed settlement and the resulting revisions to TDC's correspondence rules. *See Guajardo v. Estelle*, 568 F. Supp. 1354 (S.D. Tex. 1983). The court retained jurisdiction to enforce the July 14, 1983 agreed settlement and related consent decree.[3]

II. Defendants' Motion to Terminate

Defendants have filed a motion to terminate the prospective relief the consent decree provides. Defendants' motion is governed by the Prison Litigation Reform Act (the "PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), codified as amended at 18 U.S.C. § 3626(b)(2). The PLRA limits a court's power to continue "certain forward looking relief" in civil actions challenging prison conditions. *See Benjamin v. Jacobson*, 172 F.3d 144, 154-55 (2d Cir.) (en banc), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999). The PLRA prohibits a court order approving any prospective relief unless the court first finds that such relief is: (1) narrowly drawn; (2) extends no further than

[3] Since the 1983 agreed settlement, the judgment has been modified by stipulation on more than one occasion.

necessary to correct the violation of the involved federal right; and (3) is the least intrusive means necessary to correct the violation of that federal right. *See* 18 U.S.C. § 3626(a)(1). If a court order granting prospective relief does not expressly state that these three conditions are satisfied, then the PLRA mandates that prospective relief shall terminate in the following manner:

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(b)(2); *see also Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996) (The PLRA "provides an avenue for states to end their obligations under consent decrees providing for greater prospective relief than that required by federal law."), *cert. denied*, 520 U.S. 1277 (1997).

The PLRA broadly defines "prospective relief" to include "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). The PLRA expressly includes prospective relief awarded pursuant to a "consent decree," which is defined as any relief entered by the court "based in whole or in part upon the consent or acquiescence of the parties. . . . " *See id.* at § 3626(g)(1), (9). The consent decree in this case secures an order compelling TDCJ-ID's compliance with the correspondence rules developed under the terms of the agreed settlement. *See Guajardo*, 568 F. Supp. at 1359. That order is "enforceable by contempt action should it not be followed by either

[Defendants] or [TDCJ-ID]." *Id.* Since the settlement agreement was approved in 1983, the parties have filed motions and individual inmates have sought relief under the consent decree. Because the consent decree provides for continuing prospective relief, it is subject to termination under the PLRA.[4]

The consent decree in this case was entered long before Congress enacted the PLRA. It is undisputed that the consent decree includes none of the findings required by 18 U.S.C. § 3626(b)(2). The court that entered the consent decree observed that plaintiffs "were able to secure substantially more modifications in the TDC correspondence rules and practices than they would have achieved had they prevailed on their request for injunction." *See Guajardo v. Estelle*, 568 F. Supp. 1354, 1358 (S.C. Tex. 1983). In other words, the consent decree provides for greater prospective relief than required by

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[4] Every circuit court of appeals to consider the PLRA's termination provision, including the Fifth Circuit, has upheld the statute's constitutionality. *See Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001); *see also Gilmore v. State of California*, 220 F.3d 987 (9th Cir. 2000); *Berwanger v. Cottey*, 178 F.3d 834 (7th Cir. 1999); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3rd Cir. 1999); *Nichols v. Hopper*, 173 F.3d 820 (11th Cir. 1999); *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir.) (en banc), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir.), *cert. denied*, 524 U.S. 952 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 524 U.S. 956 (1998); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 524 U.S. 955 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 529 U.S. 951 (1998); and *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997). *See also Miller v. French*, 530 U.S. 327 (2000) (upholding the constitutionality of the PLRA's automatic stay provision found in 18 U.S.C. § 3626(e)).

federal law. Defendants are entitled to the immediate termination of existing prospective relief regarding the prison conditions at issue,[5] unless plaintiffs can establish that such relief "remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

Plaintiffs contend that termination is inappropriate under section 3626(b)(3) because constitutional violations are both current and ongoing.[6] Plaintiffs bear the burden to show that such violations persist. *See Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 20 (1st Cir. 2001). Both parties have submitted supplemental briefing on whether termination is appropriate. In March

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[5] Plaintiffs express concern that the consent decree will be vacated if the court grants defendants' motion to terminate. When a court terminates a consent decree under the PLRA, the effect is to end prospective relief. The consent decree itself is not vacated. As one circuit court has explained, "[w]hile terminating a consent decree strips it of future potency, the decree's past puissance is preserved and certain of its collateral effects may endure." *Rouse*, 129 F.3d at 662. By contrast, vacating a consent decree "wipes the slate clean, not only rendering the decree sterile for future purposes, but also eviscerating any collateral effects and, indeed, casting a shadow on past actions taken under the decree's imprimatur." *Id.*

[6] Plaintiffs have also previously argued that: (1) the PLRA's termination provisions are unconstitutional; (2) the PLRA does not apply because the consent decree does not concern "prison conditions" with the meaning of that statute; and (3) the termination provisions do not apply because the consent decree does not provide for prospective relief. Plaintiffs have since withdrawn these arguments. (*See* Docket No. 1057).

1999, this court held a hearing on the motion. At that time, the court granted plaintiffs leave to conduct additional discovery and entered a scheduling order. plaintiffs have since filed more than one evidentiary supplement, to which defendants have replied.[7] The parties' submissions and contentions are considered below.

III. Allegations of Current and Ongoing Constitutional Violations

The consent decree and the correspondence rules adopted under that decree implicate the First Amendment to the United States Constitution. Prisoners retain those First Amendment rights that are not inconsistent with their status as prisoners or with the legitimate penological objectives of the correctional institution. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984). "[C]entral to all other

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[7] At a status conference on September 6, 2002, both parties indicated that no evidentiary hearing was required. "The PLRA does not specifically provide for an evidentiary hearing prior to termination of a consent decree." *Laaman*, 238 F.3d at 16. A court must, if the plaintiffs request, allow an opportunity to show current and ongoing violations of their federal rights. *Benjamin*, 172 F.3d at 165-66. Plaintiffs were given that opportunity following the hearing on the motion to terminate in March 1999, and they have submitted voluminous exhibits. (Docket No. 996, 998). This court has considered plaintiffs' evidentiary submissions and finds that they do not allege specific facts which, if true, would establish systemwide constitutional violations sufficient to continue prospective relief in this class action in accordance with the PLRA's mandate. *See, e.g., Cagle v. Hutto*, 177 F.3d 253 (4th Cir. 1999) (holding that the decision to hold a pre-termination evidentiary hearing is within a district court's discretion unless the party opposing termination alleges specific facts which, if true, would amount to a current and ongoing constitutional violation), *cert. denied*, 530 U.S. 1264 (2000). This court concludes that an evidentiary hearing is unnecessary.

corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823 (1974); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The Supreme Court has held that "even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id.* (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977)).

In the prison context, regulations burdening an inmate's First Amendment rights traditionally have been subject to a deferential standard and held valid if "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also Thornburgh v. Abbott*, 490 U.S. 401 (1989) (applying the deferential *Turner* standard to a case dealing with the First Amendment rights of free citizens communicating with inmates). Factors typically relevant in deciding the reasonableness of such a prison regulation under this standard include: (1) whether there is a valid, rational connection between the regulation and the asserted governmental interest; (2) whether alternative means for exercising the right remain open to the prisoner; (3) the impact of the regulation on prison staff, other inmates, and the allocation of prison resources; and (4) the availability of ready alternatives to the regulation. *Turner*, 482 U.S. at 89-91.

Plaintiffs argue that it would be improper to terminate the consent decree because the prison mail system continues to violate inmates' constitutional rights. Defendants disagree, arguing that plaintiffs cannot show actual violations of prisoners' constitutional rights on a class-wide basis, sufficient to justify the consent decree's continued prospective effect. To make the required finding of a current and ongoing violation of a federal right required by 18 U.S.C. § 3626(b)(3), this court must examine the conditions in the prison at the time termination is sought, not conditions that existed in the past or that may possibly occur in the future. *Castillo v. Cameron County, Texas*, 238 F.3d 339, 353 (5th Cir. 2001).

Plaintiffs claim that constitutional violations continue in the following areas: (1) unnecessary delays by TDCJ-ID mail room personnel in processing publications; (2) delays in processing legal mail and inadequate access to indigent legal supplies, which have resulted in a denial of access to the courts; (3) improper processing of special or privileged mail, in violation of the correspondence rules; (4) improper content-based denials of correspondence and publications; (5) lack of a meaningful opportunity to appeal censorship decisions; and (6) retaliation against inmates for exercising their constitutional rights. Defendants respond that any problems are sporadic and isolated, rather than system-wide or systemic, and cannot justify the continued decree. The evidence and the parties' contentions are examined below.

A. The Claim of Unnecessary Delays in Processing Publications

Correspondence Rule 3.9.1.9 provides that an inmate's mail, "whether incoming or outgoing, shall be handled

with all reasonable dispatch."[8] Plaintiffs allege that prison officials engage in unnecessary delay in the processing of publications, pointing to failures to comply with Rule 3.9.10.6, otherwise known as the "72-hour rule," as evidence of a current and ongoing constitutional violation.

The 72-hour rule, which governs the rejection of publications received by TDCJ-ID inmates, provides as follows:

> If a publication is rejected, the inmate, the editor and/or the publisher will be provided a written notice of the disapproval and a statement of the reason therefore within seventy-two (72) hours of receipt of said publication on Publication Denial Forms. Within the same time period, the inmate, the editor and/or the publisher shall be notified of the right to and the procedure for appeal. The inmate will be given a sufficiently detailed description of the rejected publication to permit effective utilization of the appeal procedures. Whereupon the inmate, the editor or the publisher may appeal the rejection of the publication through the Correspondence Review Procedure outlined in Rule 3.9.14.

(Correspondence Rule 3.9.10.6). Defendants appear to concede that they have not complied fully with this rule

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[8] Correspondence Rule 3.9.1.7 provides that all incoming mail, including packages, will be delivered within forty-eight hours of receipt, except on weekends or holidays when seventy-two hours is allowed. That rule also provides that outgoing mail is delivered to a United States Postal Officer within forty-eight hours, except on weekends or holidays, when seventy-two hours is allowed.

and the parties have negotiated toward a modified approach.[9]

Even if plaintiffs' complaint is true and defendants' review of publications is untimely under the 72-hour rule, a State's failure to follow its own rules or regulations, standing alone, does not establish a constitutional violation. *See Jackson v. Cain*, 864 F.2d 1235, 1251-52 (5th Cir. 1989); *see also Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986) (per curiam) (rejecting an inmate's claim that TDCJ-ID's mere failure to follow an administrative rule violated his constitutional rights). The Fifth Circuit has stated that delay in processing a prisoner's mail "will not offend the constitution unless it is shown that the delay prejudiced the prisoner legally." *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988). Plaintiffs do not allege or show that class members have suffered actual prejudice from a violation of the 72-hour rule. Plaintiffs' bare allegation that defendants have failed to comply with the 72-hour rule does not demonstrate a current and ongoing constitutional violation requiring the continuation of the decree for the purpose of 18 U.S.C. § 3626(b)(3).

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[9] Defendants have filed a motion to modify the 72-hour rule portion of the consent decree. (Docket No. 878). That motion remains pending. Plaintiffs advise, however, that the parties have reached a "tentative agreement" and that defendants have "voluntarily adopted a rule which conforms in large part to that agreement." (Docket No. 970, at 4-5). Plaintiffs report further that the adopted rule is "a marked improvement over Defendants' prior practice." (*See id.* at 5 n.6). Defendants have filed a motion to abate their request for a modification of the 72-hour rule, advising that, should the court grant the motion to terminate the consent decree, the motion to modify would become moot. (Docket No. 897).

B. The Claim of Delayed Mail Resulting in a Denial of Access to Courts

Plaintiffs characterize TDCJ-ID's mail system as unreliable and slow and complain that delayed mail has resulted in denial of access to courts. Prisoners clearly have a constitutionally protected right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 360 (1996) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)). This right "is founded on the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Access to the courts is also protected by the First Amendment's right to petition the government for redress of grievances. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Brewer v. Wilkinson*, 3 F.3d 816, 820-21 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994).

A prisoner's right of access to courts is not limited. *See Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (citing *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir.), *cert. denied*, 522 U.S. 995 (1997)). The right encompasses only a reasonably adequate opportunity to file nonfrivolous legal claims challenging convictions or conditions of confinement. *See Jones*, 188 F.3d at 325 (citing *Lewis*, 518 U.S. at 351). Inmates are "not guarantee[d] the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Lewis*, 518 U.S. at 355. They are guaranteed "the conferral of a capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* To show a denial of access to the courts under these

circumstances, a plaintiff must demonstrate that an "actual injury" stemming from the processing of his mail. *See Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999) (citing *Lewis v. Casey*, 518 U.S. 343, 351-54 (1996)); *see also Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). A prisoner must establish that "his position as a litigant was prejudiced by his denial of access to the courts." *McDonald v. Stewart*, 132 F.3d 225, 231 (5th Cir. 1998).

Declarations from class members generally reference thirty-eight instances of delayed or mishandled inmate mail that allegedly resulted in a missed court deadline or the dismissal of a legal proceeding. (Docket No. 996, Ex. A. Tab 1 (category 1)). Defendants note that in many of the declarations, inmates claim a denial of access to a court but do not identify the case name or cause number. There is no way to determine the extent to which these prisoners' constitutional right of access to the courts was violated, if at all. *See Johnson*, 110 F.3d at 311-12 ("Almost all of the prisoners who testified alluded to participation in numerous lawsuits. In the absence of detailed information regarding the named parties, subject matter, arguable merit, and disposition of those lawsuits, however, there is no way to determine the extent to which the prisoners' constitutional rights of access to the courts are . . . implicated."). A review of all the declarations shows that they fail to establish a violation of the right of access to courts.

Class member Thomas Sawyer complains in his declaration that mail room personnel removed a certified inmate trust fund history from court correspondence, which he claims caused him to lose his appeal. (Docket No. 996, Ex. A, Tab 151). Defendants present evidence that the Fifth Circuit granted Sawyer leave to proceed *in forma*

pauperis without the benefit of his inmate trust fund account statement and then dismissed his appeal, finding it frivolous. (Docket No. 999, Ex. G-1). Sawyer does not establish that he was actually prejudiced by any action taken by TDCJ-ID personnel. This allegation does not establish a violation of the constitutional right of access to the courts.

James William Smith alleges that mail room officials mistakenly "mislabeled" copies of his federal habeas corpus petition and sent them to Kim Vernon, the General Counsel of the Texas Board of Pardons and Paroles, instead of to the United States District Court for the Eastern District. (Docket No. 996, Ex. A., Tab 161). Smith claims that Vernon refused to return his pleadings. Smith confided in correspondence attached to his declaration that he had other copies of his pleadings available. Smith does not allege that he missed a limitations deadline or that he was unable to pursue habeas corpus relief as a result of intentional or malicious conduct attributable to prison mail room staff. This claim does not demonstrate a constitutional violation.

Troy Bishop alleges that he placed a complaint in the mail on September 18, 1996, and that it was stamped by the mail room on September 20, 1996, the same day the statute of limitations expired. (Docket Entry No. 996, Ex. A, Tab 11). Bishop claims that because the mail was not recorded in the outgoing legal mail log until September 24, 1996, the district court dismissed his case as barred by limitations. *See Bishop v. TDCJ-ID Havins Unit*, Civil Action No. 3:96cv2712 (N.D. Tex.). Defendants respond by submitting a letter from Bishop, in which he admits that he had proof that he had timely placed his complaint in the mail, but chose not to submit this proof to the court.

(Docket No. 999, Ex. H-12). Defendants argue that because Bishop deprived the district court of this evidence, he cannot demonstrate that the dismissal was attributable solely to delay by TDCJ-ID mailroom personnel. Defendants note further that plaintiffs have not demonstrated that Bishop's claims were "nonfrivolous." This court agrees that this case does not establish a valid claim for denial of access to courts.

Randy Burleson claims that mail room staff "refused" to file a brief with the United States Supreme Court "concerning violence and cigarett[es]" and that his case was dismissed "as untimely and lacking jurisdiction" as a result. (Docket No. 996, Ex. A, Tab 15). Burleson provides no specific information about his case, although he hints that the defendant was Allen Polunsky. Court records reveal only one federal court action by Burleson, styled *Burleson v. Polunsky*, Civil Action No. 95cv256 (W.D. Tex.). The district court in that case granted the defendants' motion to dismiss and the Fifth Circuit dismissed Burleson's appeal as frivolous. If Burleson's petition for a writ of *certiorari* concerned this case, he cannot establish that he was denied the right to file a nonfrivolous claim. This allegation does not establish a violation of the constitutional right of access to the courts.

Bennie Finister alleges that mail officials delayed mailing his appellate brief and that, as a result, his appeal was "nearly" dismissed. (Docket No. 996, Ex. A, Tab 46). A near dismissal does not rise to the level of actual prejudice necessary to claim a denial of access to the courts. This claim does not establish a constitutional violation.

David Tweedy complains that mail room staff confiscated an envelope of pleadings prepared for him by another

inmate. (Docket No. 996, Ex. A, Tab 177). Defendants respond by explaining that Tweedy's mail was withheld because the return address on the correspondence did not match the inmate's name.[10] (Docket No. 999 at 20, n. 26). Defendants note that Tweedy could have agreed to allow mail room officials to treat the mail as general correspondence or he could have appealed the decision to withhold the correspondence. Tweedy did neither. Because Tweedy bears the responsibility for his failure to comply with prison regulations that area not challenged, this example does not demonstrate a constitutional violation.

Richard Ayers maintains that prison officials delayed sending his objections to the magistrate judge's report and recommendations in *Ayers v. Kinker, et al.*, Civil Action No. 6:92cvg242 (E.D. Tex.).[11] Ayers claims that because his objections were late, the district court adopted the magistrate judge's memorandum and recommendation without considering the objections. Court records provided by defendants reflect that the court did not receive Ayers's objections before adopting the memorandum and recommendation. However, these records also show that the district court considered at least two motions for reconsideration filed by Ayers. This record does not establish that Ayers lost his opportunity to have the district court consider the issues and arguments raised in his objections.

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[10] Correspondence 3.9.1.1 requires inmates to place their name, number, and address on each envelope.

[11] Ayers reportedly used an envelope provided by the district court. According to Defendants, the envelope containing Ayers's objections was delayed because it failed to comply with Correspondence Rule 3.9.1.1, which requires inmates to include their name, number, and address. (Docket No. 999 at 21 & n.27).

Ayers's claim does not demonstrate a constitutional violation of the right of access to the courts.

Rafael Vasquez complains that the mail room at the Allred Unit lost several volumes of exhibits related to *Vasquez v. Bexar County Adult Detention Center*, Civil Action No. 95cv477 (W.D. Tex). (Docket No. 996, Ex. A, Tab 178). Vasquez explains that he had attached "voluminous exhibits" to his petition for a writ of *certiorari* in that case. He claims that the mail room lost his exhibits when the United States Supreme Court returned them. As a result, he claims that he was denied the opportunity to file a motion for rehearing from the United States Supreme Court's decision to deny his petition for a writ of *certiorari*. (*See id.*). Vasquez does not indicate what, if any, meritorious claims he would have raised in his motion for rehearing, or that the absence of exhibits presented him from filing his motion. Given that Vasquez had the opportunity to present his claims to the district court, the court of appeals, and the Supreme Court on a petition for a writ of *certiorari*, his allegations do not demonstrate that he was actually prejudiced by the loss of his exhibits. This claim does not state a constitutional violation.

Anthony Gill reports that, in a letter dated November 29, 1995, the United States Supreme Court returned his petition for a writ of *certiorari* and advised him that he had sixty days to correct certain filing deficiencies. (Docket No. 996, Ex. A, Tab 57). Gill complains that he received this letter stapled to a United States Postal Service Form 1510 (a "PS 1510" form) on February 7, 1996, but that it was too late to comply. Defendants explain that a PS 1510 form is a "tracer form" used by individuals to send to the United States Postal Service to race missing mail. (Docket No. 999 at 22, n.29). According to defendants, this means

that the mail was not lost by TDCJ-ID. Grievance paperwork attached to Gill's declaration indicates that the lost letter and PS 1510 form arrived at TDCJ-ID on February 6, 1996 and was delivered to Gill the next day, on February 7, 1996. This evidence does not establish that TDCJ-ID personnel tampered with or otherwise delayed Gill's mail, in violation of his right of access to the courts.

Alvin Goodwin claims that, in "early 1996," a supervisor at the Ellis I mail room delayed mailing the notice of appeal in a case in which he was one of the plaintiffs, *Castillo et al. v. Lynaugh et al.*, Civil Action No. H-91cv2576 (S.D. Tex.), causing the plaintiffs to miss their appellate filing deadline. (Docket No. 996, Ex. A, Tab 61). Court records show that the court dismissed that case on April 23, 1993. Delay by the mail room supervisor, if any, did not cause the notice of appeal to be untimely. This court also notes that the *Castillo* case was dismissed as frivolous. Goodwin cannot show that he was denied the opportunity to litigate a nonfrivolous claim. This allegation is not evidence of a constitutional violation of the right of access to the courts.

Claude Joiner claims that he submitted legal documents for mailing on or about January 29, 1999, but that the mail room staff delayed mailing them for over two months. (Docket No. 996, Ex. A., Tab 96). Joiner claims that as a result, his appeal in *Joiner v. Director, TDCJ-ID*, Civil Action No. 6:95cv707 (E.D. Tex.) was dismissed. Defendants provide mail logs showing that legal mail from Joiner was sent to the United States District Court for the Eastern District of Texas and to the United States Court of Appeals for the Fifth Circuit on January 27, 1999. (Docket No. 999, Ex. H-9). Court records for the case Joiner referenced show that the Fifth Circuit dismissed

the appeal for Joiner's failure to order the transcripts or make financial arrangements with the court reporter. *See Joiner v. Director, TDCJ-ID*, (5th Cir. No. 98-41142 March 12, 1999). Joiner then filed numerous motions seeking transcripts at government expense. On December 3, 1999, the Fifth Circuit reinstated the appeal. On November 15, 2000, the Fifth Circuit affirmed the district court's dismissal order. There is no indication in the record that Joiner was denied access to courts because of any delay in processing his mail.

Jeff Leggett makes a vague reference to "problems" with filing a timely pleading with the federal district court in Amarillo because the court ordered TDCJ-ID to produce a copy of the mail log. (Docket No. 996, Ex. A, Tab 107). Leggett maintains that he placed his legal documents in the mail box in time, but that they were not logged in or mailed to the court in time. Leggett had two federal habeas corpus proceedings on file at that time, *Leggett v. Sanders*, Civil Action No. 2:95cv309 (N.D. Tex.) and *Leggett v. Director, TDCJ-ID*, Civil Action No. 2:95cv310 (N.D. Tex.). The district court denied each one on March 31, 1999. Leggett appears to claim that he timely filed motions for extensions of time to file notices of appeal by placing the motions in the prison mail system on April 29, 1999. The district court received those motions on May 6, 1999. Leggett then filed notices of appeal on June 3, 1999. The district court ordered the respondents to provide copies of the outgoing prison mail logs for the relevant period. The district court considered the outgoing mail logs

and denied Leggett's motions for an extension of time.[12] Subsequently, the Fifth Circuit dismissed Leggett's appeals for lack of jurisdiction because his notices of appeal were untimely. *See Leggett v. Sanders*, No. 99-10657 (5th Cir. Sept. 12, 2000) and *Leggett v. Director, TDCJ-ID*, No. 99-10649 (5th Cir. Sept. 12, 2000). Leggett does not demonstrate that his delay in submitting the motions was caused by TDCJ-ID. Leggett does not demonstrate that TDCJ-ID violated his constitutional right of access to courts.

Darryl Daniel claims that the Fifth Circuit dismissed his appeal in *Daniel v. Ferguson*, Civil Action No. H-95cv3613 (S.D. Tex.), because mail room officials did not forward a court order from the Ellis I Unit to the Estelle Unit, where he had been transferred. The order, dated March 31, 1998, required Daniel to authorize payment of the initial partial appellate filing fee. *See Daniel v. Ferguson*, No. 98-20029 (5th Cir. June 23, 1998). The appeal was dismissed when Daniel failed to comply. However, the docket sheet shows that Daniel failed to inform the court of his change of address. The court's local rules provided that a *pro se* litigant is responsible for keeping the Clerk advised, in writing, of his current address. *See* Rule 83.4 of the Local Rules for the United States District Court for the Southern District of Texas, Houston Division. The court only sends notices to the address on file. If Daniel had

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[12] In doing so, the district court would have considered whether Leggett had complied with Rule 4(a) of the Federal Rules of Appellate Procedure. Rule 4(a)(5) requires that motions for an extension of time must be filed no later than 30 days after the time prescribed by Rule 4(a) expires, and that the movant demonstrate excusable neglect or good cause. FED. R. APP. P. 4(a)(5).

provided a current address, the court would have sent his mail to the Estelle Unit, rather than to his former facility. This allegation does not state a claim that prison officials denied Daniel access to the courts.

William J. Dockeray complains that, on April 9, 1999, he received a notice from the Texas Court of Criminal Appeals dated March 11, 1999. (Docket No. 996, Ex. A, Tab 43). He received another notice from the Texas Court of Criminal Appeals on April 30, 1999, that was dated April 14, 1999. Dockeray points to these incidents and complains of the delay. Plaintiffs do not demonstrate how Dockeray was harmed, if at all, by this delay. In the absence of actual prejudice, Dockeray's allegations do not state a constitutional violation.

Jesse Ware complains that, although he placed his complaint in the mail on December 8, 1997, the district court did not receive it until December 30, 1997. (Docket No. 996, Ex. A, Tab 183). Ware claims that, as a result, his lawsuit was dismissed on the basis of limitations. In that case, following a trial, a jury found that Ware did not place his complaint in the mail before December 13, 1997 and that his complaint was time-barred as a result. *See Ware v. Scott*, Civil Action No. C-98cv16 (S.D. Tex.). To the extent Ware claims that prison officials delayed filing his complaint, a jury has already found otherwise. The Fifth Circuit affirmed the district court's final judgment. *See Ware v. Scott*, No. 99-41212 (5th Cir. May 3, 2001). Given the jury's findings against him, Ware's allegations do not

show that prison officials denied him access to the courts by delaying his mail.[13]

Clarence G. Wilkins Jr. alleges that he has filed "writs" with the Fifth Circuit that have not reached the court. (Docket No. 996, Ex. A, Tab 189). A review of court records shows that Wilkins has filed no fewer than thirteen prisoner cases in the federal courts. He provides no information about the "writs" or any other documents he may have filed with the Fifth Circuit. His conclusory allegation does not demonstrate a claim for denial of access to the courts.

Timothy Redic alleges that, in December 1998, he stopped receiving notices from this court concerning several of his pending lawsuits. (Docket No. 996, Ex. A, Tab 141). Defendants present incoming mail logs which document that Redic received several items of correspondence from the court in December 1998. (Docket No. 999, Ex. H-11). Defendants note that it is possible that Redic did not receive certain pieces of court correspondence because he failed to provide the court with a current address after he was transferred to TDCJ-ID from the Harris County Jail.

A national prisoner index shows that Redic has filed over twenty-three cases in federal court while incarcerated. Redic's filing practices have made it necessary for courts to enter orders directing the Clerk's Office to return all mail received from Redic by marking his correspondence "Frivolous Filer; Return to Sender." *See Redic v.*

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[13] Ware filed a separate suit complaining that prison officials falsified information that resulted in the dismissal of his previous case under the statute of limitations. *See Ware v. Becker*, Civil Action No. H-00-2237 (S.D. Tex.). That case was dismissed as frivolous.

Johnson, Civil Action No. H-00-2680 ((S.D. Tex.) Docket No. 67). The Fifth Circuit has also barred Redic from filing any further submissions. *See Redic v. County of Harris*, No. 01-20243 (5th Cir.). Plaintiffs cannot demonstrate that Redic was denied an opportunity to presenting a nonfrivolous issue as a result of any mishandling of his mail. This example provides no evidence of a constitutional violation.

Demetrius Moore claims that, in 1996, prison officials prevented him from filing a timely appeal in Walker County Court Cause No. 19,309-C, styled *Maurice Pennington a/k/a Demitrious P. Moore v. J.A. Collins*, by failing to deliver an order from the court. (Docket No. 996, Ex. A, Tab 127). Defendants present evidence that Moore's appeal was dismissed for lack of subject matter jurisdiction because it concerned an interlocutory summary judgment order. (Docket No. 999, Ex. G-6). Moore's allegation that the mail room failed timely to deliver the county court's order, even if true, does not show actual prejudice. This allegation does not demonstrate a constitutional violation.

Plaintiffs complain that TDCJ-ID has interfered with correspondence from inmates assisting other inmates with legal proceedings. They cite the experience of inmate Susan N. Rivas as an example. (Docket No. 996, Ex. A, Tab 146). Rivas alleges that, on one occasion, prison officials "intentionally impeded" her ability to file a "power of attorney" form prepared for another inmate. (*See id.*). Plaintiffs do not demonstrate that Rivas's position as a litigant was prejudiced in any way as a result of any impediment to filing the power of attorney form. The Supreme Court has held that prisoners possess no First Amendment right to provide legal assistance to other inmates. *Shaw v. Murphy*, 532 U.S. 223, 225 (2001). Inmate-to-inmate correspondence, which may include legal advice,

enjoys no special protection under the First Amendment. *See id.*, 532 U.S. at 230-32. This claim does not show a constitutional violation.

Plaintiffs argue further that TDCJ-ID has violated the correspondence rules by providing inmates with inadequate access to indigent legal supplies, which has also prejudiced there constitutional right of access to courts.[14] Plaintiff point to a declaration from inmate Robert Magoon. (Docket No. 996, Ex. A, Tab 115). Magoon claims that a lack of supplies prevented him from answering a court order entered in one of his civil rights cases. *Magoon v. West*, Civil Action No. 01:96cv0090 (E.D. Tex.), and that the case was dismissed for want of prosecution as a result. Court records presented by defendants show that Magoon's case was dismissed after he failed to keep the district court informed of his current address. (Docket No. 999, Ex. G-10). These records further show that the case was later reinstated. (*See id.*) Magoon suffered no actual harm as a result of inadequate access to legal supplies; he has no claim for denial of access to the courts.[15] This example does not evidence a current and ongoing constitutional violation.

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[14] Correspondence Rule 3.9.7.1 provides that "[p]ostage and stationary for mail from indigent inmates (defined as those inmates with less then $5.00 in the Inmate Trust Fund Account) may be secured through the mail room or the Warden's representative.

[15] Plaintiffs also point to inmate Richard Ayers and Pearl Lanum as additional examples involving a lack of adequate indigent supplies. (Docket No. 996, Ex. A, Tabs 4 and 105). As with Magoon, a review of these inmates' declarations shows that neither provide proof that an alleged lack of access to adequate supplies resulted in actual prejudice amounting to a denial of access to the courts.

Plaintiffs point to several examples of what they claim is TDCJ-ID's failure to abide by the rules definition of what constitutes a "package." (Docket No. 996, at 8-9, Ex. A, Tabs 31, 55, 68, 125, 165, 175, 179). In none of these instances, however, do plaintiffs demonstrate that any misapplication of the rule definition of a "package" resulted in actual prejudice to a prisoner's position as a litigant in a court proceeding. These allegations do not show a denial of access to the courts.

At best, plaintiffs' evidence depicts isolated instances in which delays or mishandling of mail have caused some inconvenience or interference with a prisoner's access to court. Plaintiffs have not shown a system-wide or institutional disregard for, or violation of, the right of access to the courts. Even if each of the thirty-eight instances plaintiffs identified was true, however, the small number of claims and the idiosyncratic nature of the acts and omissions described do not demonstrate current and ongoing constitutional violations a system-wide basis. The evidence simply fails to demonstrate systemic denial of access to courts as a result of problems with the prison mail process.

C. The Claim of Improper Processing of Special or Privileged Correspondence

Plaintiffs complain that prison officials have violated the correspondence rules by opening mail belonging to a privileged class. Specifically, plaintiffs complain that prison mail room employees have opened sealed correspondence to and from courts, governmental agencies or officials, attorneys or legal aid societies, and the media, in violation of the correspondence rules.

Correspondence rules 3.9.2, 3.9.3, and 3.9.4 allow incoming "special correspondence" from courts and governmental agencies, attorneys, or the media to be opened only in the inmate's presence and then only for the purpose of inspecting for contraband. Outgoing sealed mail is not subject to search. Correspondence Rule 3.9.9 requires that mail room staff check outgoing mail to verify that it is addressed correctly to a special, legal, or media correspondent in accordance with the rules. Correspondence addressed incorrectly is to be returned to the prisoner.

1. The Claim of Opening Special or Privileged Correspondence

Plaintiffs report that, in four instances, correspondence from United States District Court Judge William Wayne Justice in the *Ruiz* prison conditions case and letters from *Ruiz* class counsel Donna Brorby have been opened by TDCJ-ID mail room staff. (Docket No. 996, Ex. A, Tabs 134, 149, 151, and 159). Two inmates report that correspondence from counsel in this case has been opened outside of their presence. (Docket No. 996, Ex. E, Tabs 1 and 2). According to plaintiffs, declarations from class members reference a total of seventy-five instances in which prison officials opened mail from attorneys or legal aid societies outside the inmates' presence and seventy instances in which mail from government agencies or officials, including courts, was opened outside the inmates' presence, in violation of the correspondence rules. (Docket No. 996, Ex. A, Tab 1 (category 6 & 7)). Plaintiffs allege that TDCJ-ID officials have opened sealed mail to and from media outlets on numerous occasions, in violation of the correspondence rules. (Docket No. 996, Ex. A, Tabs 6, 93, 103, 104, 112, and Ex. B, Tabs 2, 3, and 4).

Prison officials do not violate the Constitution by opening and inspecting incoming mail. A prison has a legitimate security interest in opening and inspecting incoming mail for contraband.[16] *Thornburgh*, 490 U.S. at 413-14; *Turner* U.S. at 91-92. The United States Supreme Court has emphasized that "by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, [prison officials] have done all, and perhaps even more, than the Constitution requires." *Wolff*, 418 U.S. at 577.

Legal mail, in particular, is entitled to protection. Clearly marked legal mail may not be censored. *Henthorn v. Swinson*, 955 F.2d 351, 353 (5th Cir.) (citing *Freeze v. Griffith*, 849 F.2d 172, 175 (5th Cir. 1988)), *cert. denied*, 504 U.S. 988 (1992). This right is not absolute, however. Prison officials may establish reasonable regulations, such as requiring an attorney to identify himself in writing to prison officials, before they must treat correspondence as legal mail. *Id.* (citing *Taylor v. Sterrett*, 532 F.2d 462, 475 n.20 (5th Cir. 1976)). The Fifth Circuit has recognized that "the violation of a prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights." *Brewer*, 3 F.3d at 825; *see also Henthorn*, 955 F.2d at 353 (rejecting a complaint concerning the opening of legal mail not bearing the required "special mail" inscription outside of an inmate's presence).

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[16] Outgoing correspondence has different implications for prison security than incoming materials. *Thornburgh*, 490 U.S. at 413. Thus, the Fifth Circuit has recognized that a prisoner has a "right to be free from completely arbitrary censorship of his outgoing mail." *Brewer*, 3 F.3d at 826.

An inmate's assertion that privileged mail was opened outside of his presence fails to state a cognizable constitutional claim.[17]

Defendants acknowledge that correspondence is sometimes opened in error. They argue, however, that the evidence does not show that prison officials intentionally open and read privileged inmate mail on a routine basis. Defendants point to TDCJ-ID's *Thirtieth Comprehensive Report on the Internal Auditing Program for the Uniform Inmate Mail System* for August 1998 as support. (Docket No. 996, Ex. D). This report demonstrates that TDCJ-ID had a population of 94,857 offenders from March 1, 1998 through August 1, 1998. (*See id.* at 46). During this period, mail room personnel recorded 166,353 items of incoming legal, special, and media mail. (*See id.*). Records show that 832 pieces of this type of mail were reported as opened in error during this period. (*See id.*). During this same period, mail room personnel processed a total of 5,964,160 items of incoming general correspondence. (*See id.* at 57). Defendants maintain that, in light of the volume of incoming correspondence, the small number of special items opened erroneously indicates that any failure to comply with the correspondence rules prohibition against opening legal, special, or media mail is isolated and unintentional, not a class-wide systematic violation of the rules.

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[17] Plaintiffs also point to several instances in which a prisoner's legal mail was opened and read by TDCJ-ID mail room staff, in violation of the correspondence rules. (Docket No. 996, Ex. A, Tabs 41, 114, 160, 183). Absent a claim that mail has been censored, such allegations do not state a cognizable constitutional claim. *See Walker v. Navarro County Jail*, 4 F.3d 410, 413 (5th Cir. 1993) (citing *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993)).

Under Fifth Circuit precedent, allegations that prison officials have opened privileged classes of mail in violation of the correspondence rules, even if true, do not rise to the level of a current and ongoing constitutional violation. *Brewer*, 3 F.3d at 825. To the extent that a prisoner's mail is opened in error, allegations of negligent mishandling, standing alone, do not state a cause of action for purposes of 42 U.S.C. § 1983. *See Richardson*, 841 F.2d at 122. In light of this authority, and in light of the record of the TDCJ-ID, this court concludes that plaintiffs' allegations that prison officials have opened privileged mail does not rise to the level of an ongoing constitutional violation.

By contrast, evidence that privileged legal mail has been censored presents a closer question. Plaintiffs allege that defendants have interfered with legal mail in this case. (Docket No. 998). Plaintiffs' counsel distributed 1,458 questionnaires to class members during the discovery phase of the proceedings on defendants' motion to terminate. After receiving only 225 timely responses, plaintiffs' counsel circulated a follow-up questionnaire. Plaintiffs present forty-six declarations from class members who allege that they never received the initial questionnaire. Forty-six other class members indicate that they returned the questionnaire, but plaintiffs' counsel did not receive them. Plaintiffs argue that this evidence shows a constitutional violation.

These allegations would, if proven, establish a constitutional violation. Defendants report that they have turned this matter over to the Internal Affairs Division. (Docket No. 1000). Even in light of this evidence, however, proof that ninety-two pieces of legal mail were interfered with is not enough to warrant continued prospective relief in the form and breadth of the current decree. *See Lewis*,

519 U.S. at 360 & n.7 (explaining that, no matter how expansive the class, there is no basis for imposing a remedial decree upon all institutions in a state's prison system unless it is shown that constitutional violations are systemwide). The evidence is insufficient to justify the continuation of the federal court decree.

2. The Claim of Restrictions on Media Mail

Plaintiffs complain that TDCJ-ID's correspondence rules unfairly restrict a prisoner's right to send sealed correspondence to the media. Correspondence Rule 3.9.4.1 requires that prisoners may send sealed letters to members of the editorial or reporting staff of any newspaper or magazine listed in the *Ayer's Directory of Publications* or the *Editor & Publisher's Yearbook*. Plaintiffs argue that this rule frustrates inmates' ability to send sealed correspondence to media outlets by allowing the prison to determine which of those outlets are "legitimate."

Plaintiffs point to two complaints from prisoners whose mail was not sent for lack of a proper addressee. (Docket No. 996, Ex. A, Tabs 85, 97). Plaintiffs also point allegations from a handful of prisoners allegedly denied an opportunity to send sealed correspondence to radio broadcasters such as Ray Hill, whose "Prison Show" is featured locally in Houston on the public radio station. (Docket No. 996, Ex. A, Tabs 14, 15, 58, 61, 78, 89, 96, 114, and 173).

A prisoner's First Amendment right to communicate with the media is properly limited by considerations underlying the penal system. *See Pell*, 417 U.S. at 822 (citing *Price v. Johnston*, 334 U.S. 266, 285 (1948)). The media have "no constitutional right of access to prisons or their inmates beyond the afforded the general public."

Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (quoting *Pell*, 417 U.S. at 834)); *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978). The Supreme Court has observed that inmates are permitted to receive limited visits from members of their families, the clergy, their attorneys, and friends. *Pell*, 417 U.S. at 824-25. In light of these alternative channels of communication, restrictions on the right to correspond with the media are constitutionally permissible if they are imposed in a content-neutral manner. *See id.* at 827; *see also Houchins*, 438 U.S. at 12-13 (identifying a number of alternatives available to "prevent problems in penal facilities from escaping public attention").

Correspondence Rule 3.9.4.1 has been upheld as providing "an objective standard for determining which newspapers and magazines qualify to send media correspondence and considerably expands the number of the newspapers and magazines covered from prior TDC practice." *Guajardo*, 580 F. Supp. at 1362. Defendants maintain that, while this rule is restrictive, it provides more access to the media than the Constitution requires.[18] Plaintiffs' inability to send sealed correspondence to certain media outlets, while having the ability to send

[18] Defendants cite a special report published by the Society of Professional Journalists which indicates that depending on prior approval of a unit's warden the press enjoys broad physical access to Texas prisons and offenders than afforded by prison administrators in other states. (Docket No. 999, Ex. K at 25). Defendants also point to an affidavit from the Program Administrator for the prison Mail System Coordinators Panel, Linda Patteson. Patteson explains that, while prisoners may not send sealed correspondence to media personnel such as Ray Hill, inmates are not denied the ability to send letters to those sources. (Docket No. 999, Ex. H at 6).

regular mail to those outlets, does not demonstrate that the current rule violates the Constitution.

D. The Claim of Content-Based Denials of Correspondence and Publications

Plaintiffs allege that defendants have denied correspondence and publications containing unpopular political subject matter or religious content, without a legitimate reason. Defendants respond that legitimate, if not compelling, reasons explain the decisions to deny the materials identified by plaintiffs.

Correspondence Rule 3.9.1.6 provides that "[a]ll general correspondence shall be subject to the right of inspections and rejection by the unit mail room officers." Under this rule, incoming and outgoing mail may be "disapproved for mailing or receipt" if it falls into any of the following categories:

(a) the letter contains threats of physical harm against any person or place or threats of criminal activity;

(b) the letter threatens blackmail or extortion;

(c) the letter concerns sending contraband in or out of the institutions;

(d) the letter concerns plans to escape or unauthorized entry;

(e) the letter concerns plans for activities in violation of institutional rules;

(f) the letter concerns plans for future criminal activity;

(g) the letter is in code and its contents are not understood by the reader;

(h) the letter solicits gifts of money under false pretenses or for payment to other inmates;

(i) the letter contains graphic presentation of sexual behavior that is in violation of the law;

(j) the letter contains information which if communicated would create a clear and present danger of violence or physical harm to a human being.

(Correspondence Rule 3.9.1.6).

Publications fall under a separate set of correspondence rules. Under these rules, inmates may receive prepaid publications only from a publisher or publications supplier, including bookstores. (Correspondence Rules 3.9.10.1, 3.9.10.2). "All publications intended for inmates shall be inspected by a member of the prison unit staff before delivery to the inmate." (Correspondence Rule 3.9.10.4). Publications may be rejected for a number of reasons set forth in Rule 3.9.10.6, as follows:

> A publication may be rejected only if: (a) it contains contraband; (b) it contains information regarding the manufacture of explosives, weapons or drugs; (c) it contains material that a reasonable person would construe as written solely for the purpose of communicating information designed to achieve the breakdown of prisons through inmate disruption such as strikes or riots; (d) a specific factual determination has been made that the publication is detrimental to prisoner's rehabilitation because it would encourage deviate criminal sexual behavior; (e) it contains

> material on the setting up and operation of criminal schemes or how to avoid detection of criminal schemes by lawful authorities charged with the responsibility for detecting such illegal activity. Publications shall not be rejected solely because they advocate the legitimate use of prison grievance procedures or urge prisoners to contact public representatives about prison conditions or because they contain criticism of prison authorities. Publications shall not be excluded solely because they have sexual content." Publications that contain graphic depictions of homosexuality, sado-masochism, beastiality, incest or sex with children will ordinarily be denied. Publications that are primarily covering activities of any sexual or political rights groups or organizations will normally be admitted.

When correspondence or publications are denied, inmates are entitled to a statement of reasons so that they may pursue an appeal. (Correspondence Rules 3.9.10.4 and 3.9.10.6).

Inmate Kenneth Malone complains that he was denied a package of publications concerning Scientology, without an adequate reason. (Docket No. 996, Ex. A, Tab 116). Linda Patteson, who is the Program Administrator for the prison Mail System Coordinators Panel (the "MSCP"), reports that the decision to deny these publications had nothing to do with their content. (Docket No. 999, Ex. H at 6). The MSCP rejected the materials because it was unable to verify the legitimacy of the package. (*Id.*). Patteson explains that prison mail room personnel will not accept packages which the MSCP cannot verify as having

come from an authorized source. (*Id.* at 6-7). In Malone's case, prison officials were simply unable to verify whether the package came from an authorized publisher.[19] Malone's allegation does not establish that the materials were denied for improper, content-based reasons.

Two inmates, Todd Steinhauer and Daniel Whitehead, complain of being denied information related to the practice of witchcraft or Wiccan. (Docket No. 996, Ex. B, Tabs 5 and 6). Defendants note that Steinhauer's correspondence was denied for attempting to organize an unauthorized group within the prison, in violation of Administrative Directive 70.40. Whitehead's correspondence to the Rowan Tree Church at Hermit's Grove was denied for violating Administrative Directive 3.72, which prohibits inmates from obtaining items from an outside supplier without prior approval from the warden. Plaintiffs do not dispute the content-neutral nature of the proffered reasons.

Other inmates, including Steinhauer, Carl Davis, and David Harris, complain that they were denied religious materials. (Docket No. 996, Ex. A, Tab 68; Ex. B, Tabs 7 and 8). Steinhauer's materials consisted of two photocopied pages depicting the "Magical and Alchemical Alphabets." Davis complains that prison officials seized his copy of the Hebrew alphabet. Harris reports that he was denied correspondence containing translations in "Hebrew or

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[19] Defendants note that inmate Dennis Hood was also denied several "Islamic Books" because the MSCP was unable to verify that they came from an authorized source. (Docket No. 996, Ex. A, Tab 85 (grievance number 98033325)). The MSCP denied materials ordered by inmate Leslie Davis from a publisher in Iran, for similar reasons. (Docket No. 996, Ex. A, Tab 38).

Greek." Defendants explain that, in each of these instances, prison officials denied the materials for security reasons because the materials in question contained text or symbols that could be used as a code.

Salvador Buentello, who serves as the Assistant Director of TDCJ-ID's Security Threat Group Management Office, explains that security threat groups or prison gangs represent "the greatest day threat to institutional security within TDCJ, in terms of employee and offender safety and preventing illegal and unauthorized activities." (Docket No. 999, Ex. I at 2). Buentello reports that security threat groups "have utilized codes, symbols, secret messages hidden in otherwise normal text, and other means to communicate or carry out their activities undetected." (*Id.* at 3). Correspondence related to security threat groups is closely monitored. (*Id.*). Because any form of covert correspondence presents a direct risk to prison security, even those codes and symbols unrelated to "security threat group correspondence" may pose a threat to institutional security. (*Id.* at 4). Because the items identified by Steinhauer, Davis, and Harris contained text or symbols that could have been used for code, a legitimate reason existed to deny this correspondence.

Other complaints identified by plaintiffs involve the denial of publications or correspondence because of a "racial" nature. (Docket No. 996, Ex. B, Tabs 9, 10, 11, 12, 15, 17). Two letters addressed to prisoners were denied because they contained racial slurs. (Docket No. 996, Ex. B, Tabs 14, 15). Plaintiffs note that prison officials have also denied correspondence identified as coming from the Ku Klux Klan, despite the fact that it is not a designated security threat group. (Docket No. 996, Ex. B, Tabs 16, 18, 19).

Defendants respond that prison officials do not reject the items identified as "racial" in nature because of political content, but because such correspondence openly advocated or promoted racial violence. Buentello explains that racially derogatory or inflammatory materials or literature are not allowed to enter the prison system because of the potential to cause "increased racial unrest and an increased threat of violence." (Docket No. 999, Ex. I at 6). Buentello notes that the danger in allowing inmates access to this type of material is "substantial" because, once materials make it into the system, "they generally circulate among the offender population, ultimately coming to the attention of those individuals who would be offended and angered by the contents." (*Id.*). Buentello observes that because much of the violence in TDCJ occurs along racial lines, the addition of "racially derogatory or racially inflammatory materials to this mix dramatically increases the chances of violence or some other types of disturbances."[20] (*Id.* at 7).

The Supreme Court has long held that prison administration decisions are entitled to deference, especially with regard to matters of institutional safety and security. *See, e.g., Thornburgh*, 490 U.S. at 407-08 ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems

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[20] Buentello reports that when newspaper articles on the murder of James Byrd, a black man, by white assailants in Jasper, Texas circulated, "the hostility, anger and tension created resulted in a number of racial disturbances and attacks on white offenders by black offenders," in spite of the fact that the articles did not condone racial violence or contain racially derogatory remarks.

of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); *Bell*, 441 U.S. at 547 (acknowledging that courts have "accorded wide-ranging deference [to prison administrators] in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *Martinez*, 416 U.S. at 405 (conceding that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform . . . [and], where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.").

The record demonstrates that TDCJ-ID rejected the materials plaintiffs identified for valid security reasons. The Fifth Circuit has recognized that institutional security represents a compelling interest in the prison setting. *See Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997); *see also Powell v. Estelle*, 959 F.2d 22, 25 (5th Cir.), *cert denied*, 506 U.S. 1025 (1992). In light of that compelling interest, in plaintiffs have not show that prison officials denied the correspondence for improper content-based reasons, without a legitimate basis. *See Chriceol*, 169 F.3d at 316 (recognizing that a prison mail policy restricting access to potential violence producing materials is valid). The proffered examples do not demonstrate a current and ongoing constitutional violation, for the purpose of 18 U.S.C. § 3626(b)(3).

E. The Claim of Lack of a Meaningful Opportunity to Appeal Censorship Decisions

Plaintiffs allege that the correspondence rules and the prison grievance process provide an insufficient opportunity to appeal decisions by prison mail room personnel to censor or withhold mail. The decision to censor or withhold delivery of a particular piece of correspondence "must be accompanied by minimum procedural safeguards." *Martinez*, 416 U.S. at 417. Although "qualified of necessity by the circumstance of imprisonment," the interest of prisoners and their correspondents in uncensored communication is grounded in the First Amendment and is a liberty interest within the meaning of the Fourteenth Amendment. *Id.* Procedures required to protect against arbitrary governmental invasion include: (1) notice that the correspondence has been rejected; (2) a reasonable opportunity to protest that decision; and (3) that complaints be referred to a prison official other than the person who originally disapproved the correspondence. *Id.* at 418-19. TDCJ-ID's correspondence rules satisfy this criteria.

Correspondence Rule 3.9.1.6 provides that if a letter is rejected, "[t]he inmate and the sender or addressee will be provided a written statement of the disapproval and a statement of the reason therefore within seventy-two hours of the receipt of said correspondence; this notice will be given on Correspondence Denial Forms." Correspondence Rule 3.9.10.6 provides that If a publication is rejected, "the inmate, the editor, and/or the publisher will be provided a written notice of the disapproval and a statement of the reason therefore within seventy-two (72) hours of receipt of said publication on Publication Denial Forms." Both these rules expressly contemplate a "sufficiently detailed description" of the rejected item to permit

effective utilization of the appeals procedure, which is outlined in Rule 3.9.14. Correspondence Rule 3.9.14 provides that decisions rejecting correspondence or publications are determined by the prison Director's Review Committee, according to the following procedure:

> An inmate, non-inmate correspondent, or editor or publisher of a publication may appeal the rejection of any correspondence or publication or may appeal the action of the Bureau of Classification in prohibiting correspondence between an inmate and any other person by sending to the Director's Review Committee written notice of such appeal within two weeks of receipt of notification of rejection.

(Correspondence Rule 3.9.14.1). "The Director's Review Committee shall render its decision within two (2) weeks after receiving the appeal, and will notify the parties involved of its decision in writing within forty-eight (48) hours." (Correspondence Rule 3.9.14.3).

Plaintiffs acknowledge that defendants have appeals and grievance procedures in place that "facially meet the minimum constitutional standards." (Docket No. 996 at 14). Plaintiffs note, however, that there is a high number of appeals and a very low reversal rate. According to TDCJ-ID's *Thirtieth Comprehensive Report on the Internal Auditing Program for the Uniform Inmate Mail System* for August of 1998, the Director's Review Committee received 8,142 appeals between August 1, 1998, and March 1, 1998. (Docket No. 996, Ex. D at 32). Of those, only 65 decisions were reversed while 833 were returned to mail room personnel for additional paperwork. (*See id.*). Plaintiffs also point to deposition testimony from Director's Review Committee member Sherman Bell, who estimates that, in

meetings which average approximately three hours in length, the committee handles as many as five hundred to seven hundred appeals. (Docket No. 996, Ex. C, Tab 1 at 16, 26). Plaintiffs complain that, in view of these numbers, the appeals process does not provide for meaningful review. Rather, the Director's Review Committee "simply rubber stamps the decisions of mail room personnel."

In response, defendants present an affidavit from Sandra Lansford, who has been the Coordinator for the Director's Review Committee since 1990. (Docket No. 999, Ex. I). Lansford states that each appeal is closely reviewed by the committee, in the following manner:

> Appeals are closely scrutinized for appropriate and valid statements of the reason for rejection of the denied item. Letters which are denied for 'gang related content' must include written explanation from security threat group officers who review correspondence to and from confirmed and suspected security threat group members. The specific reason for content being determined to concern security threat group activities must be stated. If this information is not provided, the correspondence and denial form is returned to the unit. Photographs which are rejected must be rejected for their content and the denial form must clearly state the photograph(s) depict a violation of the rules. Authored books are reviewed at the unit level and pages specified as containing material in violation of the reasons for rejection contained in Rule 3.9.10.6 will be scanned or read by DRC staff to ensure the denial is correctly stated on the denial form.

(*Id.* at 1). Lansford adds that, where the question is close or the denial questionable, the committee "closely examines

the content" of the correspondence or publication before voting. (*Id.* at 2).

Sherman Bell's deposition offers an additional description of the appeals process performed by the Director's Review Committee. He explains that each member of the committee receives a packet of the challenged denials, with a space to vote "yes" or "no" as to each. (Docket No. 996, Ex C, Tab 1 at 27). He explains the process:

> Those cases that are difficult or unusual are always brought to us with all documentation. The other cases are not. And we vote on those – all of the cases. If we have any question about it, the staff have to get the information and bring it to us. We vote on those cases. If there is something that needs to be read during the committee, it will be passed around or reviewed, such as a printed information or a picture or something that needs to be viewed. We pass it around until it gets back to there. Then we vote on it, each voting how they feel is appropriate in their professional opinion. After we have all voted, then we turn our packets back to the MSCP for the appropriate announcements to be sent out.

(*Id.* at 27-28).

Plaintiffs' main concern appears to be that the Director's Review Committee places undue reliance on information provided by the mail room personnel who made the initial decision to reject the materials. While the committee members may rely on such information, the descriptions of the appeals process indicate that the information provided is subject to scrutiny as well as the members' "professional" consideration. The fact that some decisions are reversed or returned for additional information shows

that the appeals process provided under the correspondence rules is not a meaningless "rubber stamp."

Plaintiffs allege that the prison grievance procedures are equally inadequate to protect inmates' rights concerning censorship decisions. Plaintiffs point out that the correspondence rules for TDCJ's Transfer, State Jail, and Substance Abuse facilities contain no provision for appeal to the Director's Review Committee. (Docket No. 996, Ex. H, *Defendants' Answers to Plaintiffs' First Set of Interrogatories*, at Answer to Interrogatory No. 11(o)). Offenders incarcerated at these facilities must rely on the grievance system.

TDCJ's Transfer, State Jail, and Substance Abuse facilities are apparently not considered part of TDCJ's Institutional Division for the purpose of the correspondence rules. Because the class includes only those prisoners confined to Institutional Division units, claims by prisoners held in non-Institutional Division facilities are not covered by the consent decree. To the extent that plaintiffs complain about the prison grievance process generally, defendants correctly note that the consent decree governs only the correspondence rules, not the prison grievance system. Further, based on the evidence plaintiffs provide or cite, there is no showing that the grievance process fails to provide adequate review of correspondence rule violations.

Plaintiffs complain that the grievance process fails to provide meaningful review of complaints concerning inmate mail issues because grievance investigators frequently deny relief based on no more than the word of prison mail room personnel. In support of their position, plaintiffs present six examples. (Docket No. 996 at 16, Ex.

B, Tab 23-28). In three of those examples, the prisoners complain that prison personnel have tampered or interfered with the mail.[21] The other three examples plaintiffs cite involve grievances by inmates concerning mail opened outside their presence in violation of the correspondence rules.[22]

These grievances do not concern censorship decisions similar to those addressed by the Director's Review Committee. These examples do not show that the grievance process is inadequate to provide a review of those decisions. Moreover, the small number of complaints presented do not establish that the grievance process is insufficient to address prisoner complaints in general. Because the

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[21] James Steen accuses prison mail personnel with destroying or tampering with his mail. (Docket No. 996, Ex. B, Tab 23). The grievance was denied for lack of evidence to support the accusation. (*See id.*). Raul Gonzalez, Jr., accuses a correctional officer of picking up an outgoing letter and giving it to another inmate in the prison instead of sending it to the mail room (Docket No. 996, Ex. B, Tab 24). The officer denied the inmates accusation; the grievance was denied. (*See id.*). In another grievance, Gonzalez accuses a correctional officer of failing to mail a "legal letter" to his attorney. (Docket No. 996, Ex. B, Tab 25). The warden denied the grievance after the officer stated that he did mail the letter. (*See id.*).

[22] Norman Crittenden filed a grievance accusing mail room personnel of opening mail from the Texas Supreme Court and writing derogatory comments on the contents. (Docket No. 996, Ex. B, Tab 26). The warden forwarded Crittenden's claim to the Internal Affairs Division, but declined to take any further action after mail room supervisors denied Crittendon's accusations. (*See id.*). Bruce Howser accused mail room personnel of opening a sealed letter containing a copy of House Bill 949. (Docket No. 996, Ex. B, Tab 27). The warden denied the grievance for lack of substantiating evidence. (*See id.*). Thomas H. Tramel accused mail room personnel of opening a letter from a court. (Docket No. 996, Ex. B, Tab 28). The warden denied the grievance because Tramel's allegations could not be substantiated. (*See id.*).

grievance system is not within the terms of the consent decree, plaintiffs do not demonstrate that ongoing constitutional violations in connection with the grievance process require continued prospective relief.

F. The Claim of Retaliation

Plaintiffs allege that class members have been retaliated against for exercising their right of access to the courts and that this constitutes evidence of current and ongoing constitutional violations under 18 U.S.C. § 3626(b)(3). Although many of these allegations concern grievances against mail room personnel or the right of access to the courts, defendants correctly note that the retaliation claims plaintiffs assert are separate from complaints about the correspondence rules. These allegations, however troubling they may be are outside the scope of the consent decree and do not represent current and ongoing constitutional violations in connection with the consent decree, for the purpose of 18 U.S.C. § 3626(b)(3).

G. The Claim of Persistent Systemwide Violations

The PLRA embodies "Congress's desire to get the federal courts out of the business of administering prisons, except where court action is necessary to remedy actual violations of prisoners' constitutional rights." *Gavin v. Branstad*, 122 F.3d 1081, 1090 (8th Cir. 1997), *cert denied*, 524 U.S. 955 (1998). In First Amendment cases, the actual injury requirement "derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (citing

Allen v. Wright, 468 U.S. 737, 750-52 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1981)). The Supreme Court has cautioned courts against granting wide-ranging relief in the absence of evidence showing actual harm.

> It is the role of courts to provide relief to claimants, in individual class actions, who have suffered, or will imminently suffer, actually harm; it is not the role of courts, but that of the political branches, to shape institutions of government in such fashion as to comply with the laws and the Constitution. . . . Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subjected to a governmental institution that was not organized or managed properly. If – to take another example from prison life – a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, *see Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed.2d 251 (1976), simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

Lewis, 518 U.S. at 349-50. Plaintiffs have not met their burden to show that ongoing, actual constitutional violations require the continued prospective relief of the breadth and nature of the consent decree.

Plaintiffs must show actual injury to the class as a whole. A systemwide remedy requires a systemwide injury. *Lewis*, 518 U.S. at 359 (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977)). At best, plaintiffs present isolated, individualized complaints concerning mishandled mail or disagreements over censorship decisions. Most of these complaints do not establish an individual claim for a constitutional violation. Even considering the cumulative effect of plaintiffs' evidence, the examples and evidence are insufficient to show class-wide constitutional violations, necessary to justify continued systemwide relief.

This court must terminate prospective relief unless it can find that the relief extends no further than necessary to correct the violation; that the relief is narrowly drawn; and that the relief is the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(b)(3). This court must "make new findings about whether the relief currently complies with the need-narrowness-intrusiveness requirements, given the nature of the current violations." *Castillo*, 238 F.3d at 354 (citing *Cason v. Seckinger*, 231 F.3d 777, 784-85 (11th Cir. 2000)). It is not enough under § 3626(b)(3) that the consent decree, *when entered*, was "sufficiently narrow considering the violations that existed *at that time*." *Id.* (emphasis in original). This "requir[es] particularized findings, on a provision-by-provision basis, that each requirement imposed by the consent decrees satisfies the need-narrowness-intrusiveness criteria, given the nature of the current and ongoing violation." *Id.* (citing *Cason*, 231 F.3d at 784-85). Plaintiffs do not allege or show

that the relief afforded by the consent decree in this class action satisfies any of these additional factors.

Plaintiffs concede that TDCJ-ID has implemented correspondence rules to address the complaints lodged in 1971. These rules have become institutionalized procedure within the TDCJ-ID. The Fifth Circuit has urged an end to cases that have served the purpose of improving prison conditions. *See Ruiz*, 243 F.3d at 953 (Reynaldo Garza, J., concurring). Prisoners with individual claims of First Amendment violations have a remedy under 42 U.S.C. § 1983. In the absence of evidence showing system-wide constitutional violations, there is no showing that prospective relief is necessary on a class-wide basis, that the relief is narrowly drawn, or that the relief is the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(b)(3). Defendants' motion to terminate the prospective relief afforded by the consent decree is granted.

IV. Attorneys Fees

Plaintiffs have filed a motion for attorneys' fees. (Docket No. 970). Plaintiffs have been represented continuously by the Houston office of Vinson & Elkins, which has acted vigorously and enthusiastically on behalf of the class. Through Vinson & Elkins' effort, plaintiffs were able to secure the consent decree. Defendants concede that plaintiffs are entitled to attorneys' fees in this case. However, to determine the proper amount of fees allowed, defendants havefiled a motion for a ruling on whether the PLRA applies to plaintiffs' pending request. (Docket No. 977). Defendants' motion for a ruling on the applicability of the PLRA to plaintiffs' request for attorneys fees is granted.

The PLRA places limits on the fees that may be awarded to attorneys who litigate prisoner lawsuits. *See* 42 U.S.C. § 1997e(d) and 42 U.S.C. § 1988(b). The hourly rate for plaintiffs' counsel is capped and fees must be directly and reasonably incurred in enforcing the relief ordered for the violation.[23] *See* 42 U.S.C. § 1997e(d)(B)(2); 42 U.S.C.§ 1988(b); *see also Carruthers v. Jenne*, 209 F. Supp.2d 1294, 1301 (S.D. Fla. 2002) (citing *Association for Retarded Citizens of North Dakota v. Schafer*, 83 F.3d 1008, 1011 (8th Cir. 1996)). The Supreme Court has held that the limits imposed by the PLRA apply to attorneys' fees for services performed after the PLRA's effective date of April 26, 1996, but not to fees for services performed before the effective date. *Martin v. Hadix*, 527 U.S. 343, 347 (1999); *see also Webb v. Ada County, Idaho*, 285 F.3d

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[23] The PLRA provides as follows in relevant part:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded except to the extent that –
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief order for the violation.
>
> * * *
>
> (3) No award of attorneys fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A, of Title 18, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d).

829 (9th Cir. 2002) (upholding the district court's decision to apply the PLRA's rate cap to all fees, whether related to the merits or postjudgment monitoring, earned after the PLRA's effective date), *pet. for cert. filed*, 71 U.S.L.W. 3137 (Aug. 5, 2002) (No. 02-188).

Plaintiffs' pending motion for attorneys' fees seeks an award that does not comply with the PLRA's hourly limit for work performed after April 26, 1996. Plaintiffs appear to concede that the PLRA's application will limit their recovery of attorney fees in this case. Plaintiffs indicate that they will file an amended motion for attorney fees, in light of recent authority. (*See* Docket No. 1057). Plaintiffs' pending motion for attorneys' fees is denied, at this time, without prejudice to re-urging their request in an amended motion.

V. Conclusion

This Court **ORDERS** as follows:

1. Defendants' supplemental motion to terminate the consent decree (Docket No. 898) is **GRANTED.**

2. Defendants' motion to abate proceedings on their motion to modify the consent decree (Docket No. 897) is **GRANTED,** and the motion to modify the consent decree (Docket No. 878) is **DENIED** as **MOOT.**

3. Plaintiffs' motion for attorneys' fees (Docket No. 970) is **DENIED** without prejudice to reurging that request in an amended motion. Plaintiffs are instructed to file their amended motion for attorneys' fees within sixty (60) days from the date of this order.

4. Defendants' motion for a ruling on the applicability of the PLRA to plaintiffs' motion for attorneys fees (Docket No. 977) is **GRANTED.**

5. Plaintiffs' motion for leave to supplement their evidentiary supplement (Docket No. 998) is **GRANTED.**

6. All other pending motions not specifically referenced herein are **DENIED** without prejudice to reurging by the parties if necessary.

7. This is final judgment for purposes of Rule 54 of the Federal Rules of Civil Procedure.

SIGNED on September 20, 2002, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge